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IN THE

Supreme Court of the United States

October Term, 1968

No. 1280

UNITED STATES OF AMERICA, *ex rel.* MARK FEIN,
Petitioner,

against

JOHN T. DEEGAN, as Warden of Sing Sing Prison,
State of New York,
Respondent.

PETITION (WITH APPENDICES) FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION (WITH APPENDICES) FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Mark Fein, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the office of the clerk of that court on March 24, 1969.

Opinions Below

The United States Court of Appeals for the Second Circuit rendered majority and concurring opinions. The majority opinion was by District Judge John R. Bartels of the Eastern District of New York, sitting by designation.

It is reproduced as Appendix I, *infra,* pp. 1a-21a. The concurring opinion was by Circuit Judge Sterry I. Waterman. This opinion is reproduced as Appendix II, *infra;* pp. 22a-23a. These opinions are not yet reported.

The United States Court of Appeals for the Second Circuit affirmed an opinion and order of October 13, 1967, of District Judge Edmund L. Palmieri of and for the United States District Court for the Southern District of New York, denying the petitioner's request for a writ of habeas corpus. Judge Palmieri's opinion and order are reproduced as Appendix III, *infra,* pp. 24a-36a. This opinion was not reported.

Subsequently, and on December 1, 1967, Judge Palmieri granted petitioner's motion for a certificate of probable cause. Judge Palmieri's opinion and order of December 1, 1967 are reproduced as Appendix IV, *infra,* pp. 37a-38a. Judge Palmieri's opinion and order of December 1, 1967 were not reported.

Prior to the petitioner's instant habeas corpus proceedings in the federal courts, there were proceedings in the state courts, and an appeal to this Court which was dismissed for want of jurisdiction.

The New York Court of Appeals rendered majority and minority opinions. The majority opinion was by Judge Kenneth B. Keating. It is reproduced as Appendix V, *infra,* pp. 39a-50a. The dissenting opinion was by Judge, now Chief Judge, Stanley H. Fuld. Judge Fuld's opinion is reproduced as Appendix VI, *infra,* pp. 51a-52a. These opinions are reported. *People* v. *Fein,* 18 N.Y. 2d 162, 272 N.Y.S. 2d 753, 219 N.E. 2d 274 (1966).

The New York Court of Appeals amended its remittitur of July 7, 1966 twice. The first amended remittitur was pursuant to an order dated September 22, 1966. It is reproduced as Appendix VII, *infra,* pp. 53a-55a. It is reported. *People* v. *Fein,* 18 N.Y. 2d 722, 274 N.Y.S. 2d 159 (1966).

The second amended remittitur was pursuant to an order dated February 21, 1967. It is reproduced as Appendix VIII, *infra,* pp. 56a-58a. It is likewise reported. *People* v. *Fein,* 19 N.Y. 2d 691, 278 N.Y.S. 2d 880 (1967).

This Court denied review. *Fein* v. *New York,* 385 U.S. 649 (1967). Mr. Justice Douglas was of the opinion that probable jurisdiction should be noted. This Court also denied a petition for rehearing. *Fein* v. *New York,* 386 U.S. 978 (1967). These denials are reproduced as Appendix IX, *infra,* p. 59a.

The New York Court of Appeals, Judge, later Chief Judge Fuld, dissenting, affirmed the Appellate Division, First Department, which rendered a written opinion that is reproduced as Appendix X, *infra,* pp. 60a-74a. It is reported. *People* v. *Fein,* 24 A.D. 2d 32, 263 N.Y.S. 2d 629 (1965).

The Appellate Division, First Department, in turn affirmed the Supreme Court, New York County, Justice Gerald T. Culkin presiding. He rendered a written opinion denying the petitioner's motion for a new trial, which is reproduced as Appendix XI, *infra,* pp. 75a-85a. It was not reported.

Jurisdiction

The United States Court of Appeals for the Second Circuit entered its judgment on March 24, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Did the prosecution's suppression of exculpatory evidence violate the due process clause of the Fourteenth Amendment?

2. Did the denial of pre-trial discovery and inspection of the bullets found in the decedent violate the due process clause of the Fourteenth Amendment?

3. Did the admission into evidence over objection and without a hearing of a chair obtained as a result of an illegal search and seizure violate the Fourth and Fourteenth Amendments?

4. Did New York's blue ribbon jury statute, under which the instant case was tried, violate the Sixth and Fourteenth Amendments?

5. Did the trial judge's statements to the jury violate the petitioner's right of silence under the Fifth and Fourteenth Amendments?

6. Did prejudicial publicity, emanating from the police and the prosecution, violate the due process clause of the Fourteenth Amendment?

Constitutional and Statutory Provisions Involved

Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment

No person * * * shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; * * *.

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, * * *.

Fourteenth Amendment

Section 1. * * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Former Section 749-aa of the New York Judiciary Law

(Printed in Appendix XIII, pp. 108a-115a.)

Section 813-d3 of the New York Code of Criminal Procedure

(Printed in Appendix XIII, pp. 115a.)

Statement of the Case

A. Six Constitutional Violations

The petitioner is in custody on a second degree murder conviction with a sentence of 30 years to life, which is unlawful for an even half dozen substantial and fundamental federal constitutional reasons. The petitioner urged all six grounds in the state courts, unsuccessfully. Taken singly, each of the six grounds is sufficient by itself to require a reversal of the petitioner's judgment of conviction. Taken together, the six grounds present a case study of the way in which a prosecution ought not to be conducted.

This Court under the due process clause of the Fourteenth Amendment has given our country a uniform system of criminal justice, measured, with the exception of indictment by grand jury, by the relevant specifics of the federal Bill of Rights. These relevant specifics are as fully applicable to defendants in state criminal cases as they are to defendants in federal criminal cases. Moreover, the constitutional rights of defendants in state criminal cases are measured by the same constitutional standards and yardsticks as the constitutional rights of defendants in federal criminal cases. See, *e.g.*, *Ker* v. *California,* 374 U. S. 23 (1963) (Fourth Amendment); *Molloy* v. *Hogan,* 378 U. S. 1 (1964) (Fifth Amendment privilege against self-incrimination); *Griffin* v. *California,* 380 U. S. 609 (1965) (*ibid.*); *Smith* v. *Illinois,* 390 U. S. 129 (1968) (Sixth Amendment right of confrontation); *Barber* v. *Page,* 390 U. S. 719 (1968) (*ibid.*); *Duncan* v. *Louisiana,* 391 U. S. 145 (1968) (Sixth Amendment right to trial by jury). See

generally, Rogge, *A Technique for Change,* 11 U.C.L.A. Rev. 481, 500-15 (1964), citing cases.

Whether one takes the "absorption" process reasoning of Justice Cardozo in the Court's opinion in *Palko* v. *Connecticut,* 302 U. S. 319 (1937), or the "incorporation theory" of Mr. Justice Black in his dissent in *Adamson* v. *California,* 332 U. S. 46, 68 (1947), or the more recent "selective incorporation" approach, one will arrive at the conclusion that the Court in its course of protecting the individual has reached the point where all the relevant specifics of the first eight amendments to the federal Constitution, with the single exception of indictment by grand jury, are fully applicable to defendants in state criminal cases under the due process clause of the Fourteenth Amendment. Mr. Justice Black, who still prefers his total incorporation theory, said nearly this in the last sentence of his concurring opinion in *Duncan* v. *Louisiana,* 391 U.S. 145, 171 (1968), in which Mr. Justice Douglas joined: "And, most importantly for me, the selective incorporation process has the virtue of having already worked to make most of the Bill of Rights' protections applicable to the States."

Measured by the constitutional yardsticks of the due process clause of the Fourteenth Amendment and of the relevant specifics of the federal Bill of Rights, the petitioner's prosecution violates these constitutional provisions in these six particulars:

(I) The suppression of exculpatory evidence;

(II) The denial of pretrial discovery;

(III) The admission into evidence of illegally seized material;

(IV) The use of the blue ribbon jury;

(V) The trial judge's statements to the jury which violated the petitioner's right of silence; and

(VI) Prejudicial publicity.

I—The Suppression of Exculpatory Evidence

a. Theory of the Prosecution. The instant case illustrates that facts, no matter how stubborn, are sometimes no match for a stubborn theory. Once the prosecution had settled on its theory, facts pointing to the contrary were ignored and even suppressed.

The prosecution's theory was that Mark Fein shot and killed Rubin Markowitz, a bookmaker, sometime after 4:00 P.M. on October 10, 1963, in apartment 5B at 406 East 63rd Street, which the petitioner rented under the name of "Weissman" (79-80, 1136).* After the shooting, the petitioner allegedly tied decedent's legs with a rope and placed his 180-pound body in a black steamer trunk (1137, 1140, 242, 146).

The only testimony that the petitioner shot Markowitz, or that the decedent's body, or any body, was in the trunk, came from a prostitute, one Carmela Donofrio Lazarus, whom the Appellate Division termed "a woman with an

* References are to the record in the state courts; the pagination is that on the bottom of the pages, except for the "B" pages.

extraordinary number of aliases'' (App. X, p. 67a). During the trial she was usually referred to as Gloria Kendall, or Kendal, except that the prosecutor called her Mrs. Lazarus. She was a madam and a procuress as well as a prostitute, and had a string of call girls. The Appellate Division described her as ''a completely amoral person who could well merit the defense's description as a depraved character'' (App. X, p. 72a).

Lazarus was the name of her second husband. He had been convicted of larceny and also arrested for assault with a pistol (1607, 1611-12, 1679). His uncle was Richard Schlesinger, an ex-convict who, according to a police report, was ''engaged in armed robberies of bookmakers'' (1687-88). Her ex-husband, Blaustein, had been convicted of grand larceny and extortion and arrested for involvement in a murder case. Lazarus, whose existence and relationship to Gloria were at all times concealed, remained in hiding until after the petitioner's indictment (1612, 1633).

In February 1964, after having spent a month fleeing from the police, Gloria returned from Canada and asked the petitioner to meet her; but he refused and sent an investigator, William J. Whelan, employed by his counsel (1886-87, 1184-85). Gloria admitted on cross-examination that she met Mr. Whelan on February 11, 1964 and asked him for money but he refused (1379). The blackmail nature of this demand was established by Whelan's testimony at the trial, that, upon his refusal, she threatened that ''if it ever comes to a showdown I am going to protect the ones that are dearest to me, not Mark Fein'' (1891). Those were Lazarus, Schlesinger and Blaustein.

Eight days later she visited the police and informed against the petitioner, and they, within two hours, arrested him on the charge of murdering Markowitz (1187-88, 1516-17, 1526). They did so solely upon the statement of this woman, whom they had during the preceding two months been actively investigating as the possible murderer. Now they immediately accepted her accusations at their face value (1612, 1685).

Gloria's story was that shortly after 5:00 P.M. on October 10, 1963 the petitioner telephoned her and urgently requested her to come to the Weissman apartment. Although admittedly she had not seen or heard from him for over 10 days, she nevertheless responded immediately to his call for help (1331-32). When she arrived, petitioner, so she says, showed her a trunk and said he had shot Markowitz, whose body was in the trunk (1135-40).

The way Gloria contrived her story, she had herself ask the petitioner whether he was sure that the man in the trunk was dead. Thereupon, so she says, the petitioner lifted the trunk lid, and she "saw part of an arm, and some new clothesline, and some white material that looked like a shirt" (1140).

Gloria offered to help the petitioner remove the trunk from the apartment, but petitioner insisted that she call some of her friends also (1138-39). She telephoned David Broudy, whom petitioner had never met, at his home in the Bronx (1139, 875, 881). Broudy, an unemployed taxicab driver and hairdresser, who had been discharged from the Army because of extreme character and emotional disorders rendering him unfit for service in any capacity,

responded at once to Gloria's request, although he was then in bed taking an afternoon nap (881, 75B).

A second friend of Gloria's, Geraldine Boxer, known as Geri to her friends, also appeared at the Weissman apartment. At the trial, Geri and Gloria testified that when Gloria left her apartment to go to the defendant's aid, she left a message for Geri, whom she expected to call for her, with one Sandra Ede. In it she asked Geri to meet her at the Weissman apartment, and Geri testified that Sandra gave her the message on the building intercom (706-08).

According to the prosecution, the defendant and Gloria obtained a station wagon, and Broudy and the defendant loaded the trunk into it (902). Gloria then urged the petitioner to go home, so that he could attend a dinner date with his wife and some friends (1148-49). After the petitioner left, Gloria, Broudy and Geri drove to Gloria's own apartment on 73rd Street, and double parked the station wagon in front of that building (732, 904-05, 1152). Broudy and Geri remained in the station wagon while Gloria went up to her apartment, where she remained for a period of time which Broudy and Geri Boxer estimated as between one-half to three-quarters of an hour but Gloria herself estimated as between 10 to 25 minutes (791, 905, 1370).

After Gloria rejoined the group, Broudy drove the station wagon on a long, circuitous journey on the parkways about the city (907-08), finally stopping at 179th Street on the Harlem River Drive; and then they lifted the trunk over the retaining wall and threw it into the river (908). A month later, on the morning of November 8, 1963, the decedent's body was found floating in the river about three

miles away from where the trunk had been thrown in, without any sign or trace of a trunk. No such trunk was ever found. Nor was there ever any plausible explanation how the body separated from the trunk. The prosecution's case that the petitioner admitted the killing turned solely on Gloria's story.

Petitioner did not testify at the trial. In an affidavit which he subsequently submitted he stated that on October 10, 1963 he had received a telephone call from Gloria summoning him to the Weissman apartment; that when he arrived, Gloria told him Markowitz had been murdered and demanded his assistance in the removal of the trunk, threatening that otherwise he would become involved and his association with Gloria would be exposed to petitioner's wife, his family and others; that, panic-stricken, petitioner had acceded to Gloria's demands and agreed to assist her; that Gloria later continued to threaten him and attempted to extort money from him; and that it was now clear to him that there had been no body in the trunk but that this had been told to him to set him up later for a blackmail scheme (179B-182B).

At the trial the prosecutor, after concluding Gloria's direct examination, stated, with a deceptive display of candor, that Gloria had twice recanted her story in his presence—first on June 30, 1964, and, more importantly, on September 28, 1964 (1201-1204). But the prosecutor did not disclose the critical circumstances which gave the second recantation its real significance. Nor did he make any effort to correct the incomplete and thus misleading testimony of Gloria and of his own investigator, Detective James Leman, which carefully omitted the same critical

circumstances. These circumstances involve Mrs. Dagmar Ingeborg Finch Generazio, whom the prosecution successfully edited out of the case. Even District Judge Bartels conceded: "The prosecutor advised defense counsel of both recantations but not of the confrontation with Dagmar prior to the recantation." (App. I, p. 11a.)

It was a confrontation between Dagmar and Gloria in the prosecutor's office on September 28, 1964 that led to Gloria's second recantation. Without Gloria's story about the petitioner's confession to her of murder, there was no case against Mark Fein, as the prosecutor himself admitted:

> Q. * * * so that on that day, as matters stood at that time, the prosecution had no case against Mark Fein, right? A. That's right (3494-95)

The prosecution, in order to hang on to its stubborn theory that Mark Fein killed Markowitz, had to suppress Dagmar and the testimony she could give. In an excess of zeal, the prosecution did just this.

b. Mrs. Dagmar Ingeborg Finch Generazio. At a new trial hearing, Dagmar testified that on October 10, 1963, the last day that the decedent was seen alive, she was living at the apartment of Marsha Gail Weiner Tracy, usually called Gail, on East 64th Street; and, between 3:00 and 4:00 P.M., received a telephone call there from Gloria. Gloria told her that she was nearby and had a heavy box to move; and she asked Dagmar, without avail, whether Dagmar could borrow Gail's car, or any other car for her (2547-51). Dagmar also testified that before the trial she had told this to Detectives Leman and Frank Lyons, who were assigned to the case (2559-67), as well as to the prosecutor, Mr.

Vincent J. Dermody (2570-72). She further testified that they kept telling her she must be wrong as to the time of the phone call, that it must have been later (2567, 2585-86, 2592, 2593).

However, Dagmar testified that she was able to fix the time of the call at between 3:00 and 4:00 P.M. because she recalled that it was light outside when the call came; because Gail, who usually went out between 5:00 and 5:30 P.M. was still in the apartment when the call came; and because Dagmar also remembered watching the Early Show on television some time after the call came, and that program started at 5:00 P.M. (2551-52).

Gail corroborated Dagmar's testimony about the call and the fact that it came between 3:00 and 4:00 P.M. She fixed the time of the call by reference to the fact that it came shortly after she had taken her afternoon pill, which she regularly took at 3:00 P.M. for her epilepsy (3599-3600).

On May 8, 1965, 8 days after her court appearance, Gail, in a suicide note addressed to "Whom It May Concern", wrote:

> I'm writing this because I know a man's life is at stake—and I know I shall be dead soon—
>
> For my last words I again want to say I am sorry to Mark Fein and his family—all of which I do not know and never have met * * * but Dee did receive the phone call from a gal named Gloria on October 10th, 1963 a few minutes after I took my 3 o'clock medicine. This statement I add to my sworn affidavit and my sworn testimony in Supreme Court.

Please forgive me for hiding this evidence by my constant denials of any knowledge of this call to Mr. Dermody—but I could only think of my parents—and my husband & then of the baby which I lost anyway. I hope my testimony has helped clear things up.

I'm not strong enough to face any more pressures & embarrassment which this Mark Fein case has brought to me—I wanted so much to live, but the thought of facing people & maybe another trial is more than I can bear.

Marsha Gail Weiner Tracy

Please just don't hurt my family & husband any more. That's all I ask and pray for (481B-483B).

The next day she did attempt suicide by taking an overdose of barbiturates; but she was taken to Bellevue Hospital and her life was saved.

Dagmar's husband Sergeant Russell James Generazio, who was present when Detectives Leman and Lyons interviewed her at their home in New Jersey, confirmed the fact that Dagmar told the detectives that she received the call in the afternoon between 3:00 and 4:00 P.M. (2469-76).

In addition, Dagmar testified that in November 1963 and again in January 1964 Gloria came to see her, pleaded with her to "stick with her", and promised her that she would receive something valuable if she did (2552-54); and that she told the prosecutor and the detectives about these conversations as well (2588-89). Detective Lyons had even asked Dagmar if Gloria had been trying to "bribe" her (2588-89).

Detectives Leman and Lyons interviewed Dagmar at length at her home in Red Bank, New Jersey late in Sep-

tember 1964 (2299-2307, 2368-73). Thereafter she was interviewed in the District Attorney's office on four or five occasions (2311-19), and on at least three of them she was interviewed by the prosecutor himself (3354-60). In addition, Detectives Leman and Lyons were in telephone communication with Dagmar on an almost day-to-day basis during October 1964, the month the trial began. Detective Leman admitted to having had ten telephone conversations with her during that month, of which five or six were placed by him from the District Attorney's office pursuant to the prosecutor's instructions, and Leman said he did not know how many additional times Detective Lyons had talked to her (2319-21, 2324, 2438-39). He also admitted that the detectives discussed with her whether anyone representing the petitioner had been in touch with her, that they told her to advise them if anyone did, and that each time she always told them no one on behalf of petitioner had been in touch with her (2321-24).

At the new trial hearing, both the prosecutor and Detective Leman acknowledged that Dagmar had told them about Gloria's telephone call to her. Nor did they deny that Dagmar had reported to them Gloria's two subsequent requests to "stick with her". They differed only as to the time of the call: they testified she had told them the call was later, between about 6 and 7 p.m., instead of between about 3 and 4 p.m. (2371-72, 2376-78, 2430-31, 2451, 3349, 3352-53, 3357-62).

But whatever the hour of the call, the suppression of Dagmar and her testimony violated due process. If Gloria made her call between 3 and 4 p.m., then she was an accomplice; for the decedent had been alive shortly after 4:00

p.m. (278-80), and here was Gloria making plans to dispose of the body before the murder had occurred. Moreover, since 3 to 4 p.m. was considerably earlier than the time (after 5 p.m.) when Gloria claimed the petitioner summoned her to the Weissman apartment, this would have demolished the prosecution's case as Gloria presented it.

Also, if Gloria's call to Dagmar on October 10, 1963 was between 3 and 4 p.m., the suppressed evidence required the submission to the jury of the issue whether Gloria was an accomplice, in which event Section 399 of the New York Code of Criminal Procedure required that her testimony be corroborated. The defense requested such an instruction (2267-68); but it was refused by the trial judge on the ground that there was no evidence that Gloria was an accomplice.

However, even accepting the prosecution's version that the stated time of the call was between 6 and 7 p.m., the prosecution's failure to disclose it was still highly prejudicial to petitioner. First, such disclosure would have gravely impaired Gloria's credibility with respect to the specific events of the day on which the decedent was last seen alive, as well as her general credibility. Second, Gloria testified that at this very time (between 6 and 7 p.m.), while she, Broudy and Geri were driving in the station wagon with the trunk in it, she went upstairs to her own apartment and spent a substantial amount of time there, while her friends waited outside (1370, see also 791, 905). Had the prosecution disclosed that it had evidence indicating that Gloria had at that time telephoned Dagmar in an attempt to borrow a car to remove a box, the jury might

well have inferred that the decedent's body was not in the trunk at all but was elsewhere awaiting removal, and that, therefore, the entire substance of Gloria's story was false.

It was on September 28, 1964, just three weeks to the day before the trial began, that there occurred in the prosecutor's office a dramatic confrontation between Gloria and Dagmar; and Gloria's second recantation. This is Dagmar's account of what happened after she told of Gloria's call to her on October 10, 1963 at Gail's apartment:

> Q. New tell us what happened, when you repeated the story. A. After I had finished, Gloria—Gloria kept interrupting, and she was told to "shut up", you know, so I could finish.
>
> After I had finished, Gloria jumps up, grabs the phone, and says, "I'm not going to listen to this. You're trying to pin this on me. I am not going to say anything or listen to this until I call my lawyer —until I speak to my lawyer."
>
> And Mr. Dermody grabbed the phone from her and said, "Well, listen, we're not going to call anybody." And he told her to shut up. And after a couple of minutes they took her out of the room.
>
> Q. Will you describe how she was behaving at the time. Was she screaming or yelling? A. She was screaming, I'd say, yelling. (2594-95)

The prosecution's own descriptions at the new trial hearing of the confrontation between Gloria and Dagmar on September 28, 1964 were equally vivid and revealing. Both Detective Leman and the prosecutor testified that when Dagmar finished, the prosecutor asked Gloria whether

this had happened. She called Dagmar "a goddam liar", got very angry and upset, exploded and "got very excitable," screamed hysterically and was told she was upsetting the whole building by her loud noises. Detective Leman took Dagmar out of the room, and Gloria said she wanted to call her lawyer (2377-78, 2326-28, 3362-63).

The extraordinary significance of this incident became apparent when the prosecutor on cross-examination disclosed, referring to Gloria:

> She then started to yell and scream and accuse, as I said yesterday, Detective Leman of getting people to say things that weren't true. And that's when she said that she wanted to speak to a lawyer. We calmed her down. She spoke with a lawyer. And then after Dagmar left the room with Detective Leman, she said to me that she would not testify; and, as a matter of fact, she went back to the story she had given us once before in the end of June that the defendant never told her that he had shot the deceased and she had seen the body in the trunk. (3496-97)

All of these events, except the bare fact of a recantation by Gloria on that date, the prosecution in an excess of zeal concealed from the defense. Both Gloria and Detective Leman in their trial testimony concealed the presence of Dagmar at the September 28, 1964 confrontation.

During Gloria's cross-examination, trial counsel asked her who was present when she saw Mr. Dermody on September 28, 1964. She responded:

> A. I think Detectives Lyons and Leman.
>
> Q. Anybody else? A. I don't remember anyone else. (1393)

Detective Leman likewise concealed Dagmar's presence at the September 28, 1964 meeting in the prosecutor's office. When trial counsel questioned him who was present he answered:

> A. There was Mr. Dermody and Detective Lyons, and, again, there was either Mr. McKeever or Mr. Reynolds was present. (1638)

Neither during his cross-examination nor during the prosecutor's redirect (1665-66) did Detective Leman make any reference whatsoever to the presence of Dagmar or to her confrontation and contradiction of Gloria. Like Gloria, he obliterated every trace of Dagmar from his testimony, thereby concealing not only her but also the whole purpose of the meeting.

The Appellate Division in effect admitted the inaccuracy of the testimony of Detective Leman as well as Gloria in omitting Dagmar from the September 28, 1964 meeting when it stated:

> * * * Technically speaking, this testimony was correct, because, at the time of recantation she was not present. But it was not an accurate statement as to those present at the interview. (App. X, p. 81a)

But the testimony was not even "technically" correct, despite the efforts of District Judge Bartels to make it appear so (App. I, p. 11a). Both Gloria and Detective Leman were testifying, not about the time of the recantation, but about the confrontation between Gloria and Dagmar, which immediately preceded it. Thus Gloria included Detective Leman among the persons present (1392-93). Since Leman was not present during the recantation itself

any more than Dagmar was (1393, 2328), they having left the room together (3497), Gloria was obviously testifying, and lying, about the time preceding her recantation, when Dagmar, as well as Detective Leman, were there. In Detective Leman's case, he could not possibly have referred to the recantation itself because he admittedly was not present when it occurred (1637-38, 3496-97). At the new trial hearing Detective Leman expressly acknowledged that he left the room with Dagmar and did not "know what happened after that" (2328). At the time when he and Gloria were present, so was Dagmar.

The respondent cannot possibly claim that the prosecution had forgotten about Dagmar. She was the whole occasion for the September 28, 1964 meeting. Detectives Leman and Lyons were in almost daily telephone communication with her during October 1964, the month the trial began. Most important of all, at the high point of the trial, on Friday, November 13, 1964, the District Attorney's office concededly made an extensive telephone call to Dagmar at her home in Red Bank, New Jersey (Telephone Company records 2747-49). This particular call demonstrates the prosecution's systematic course of suppressing exculpatory evidence; for this call was made on the very same day that Gloria gave some of her false testimony eliminating Dagmar from the September 28, 1964 meeting at the prosecutor's office (1323, 1392), and only two court days preceding Detective Leman's testimony on November 17 to the same effect (1558, 1637-38). Indeed, the call was made on the court day preceding Gloria's redirect examination on Monday, November 16 (1400), when the prosecutor again reverted to the September 28 meeting without in any way

bringing out the suppressed facts (1429-31). It is evident that the prosecution would have handled the matter very differently if the report from Dagmar had been to the effect that she had been located by the defense, so that the prosecution would have concluded that concealment was no longer safe.

Moreover, the prosecutor permitted Gloria not only to omit all reference to Dagmar; but also to conceal the fact that the reason for her recantation on September 28 was her confrontation with Dagmar. Instead, the prosecutor let her give as the reason for her second recantation: "The idea of coming here and saying these things that might hurt this man was against all my principles" (1429).

The prosecutor also let Detective Leman conceal the real reason for Gloria's second recantation, and on redirect examination at that. The prosecutor asked Leman to explain what happened at the time that Gloria had asked to phone her lawyer and had requested him to leave the room, and he replied:

> A. Well, she accused me of questioning friends of hers and being a—she accused me of being a Gestapo agent.
>
> Q. Is that the term she used? A. Yes.
>
> Q. And was it in that connection that she said she objected to you being present in the room? A. Yes. (1666)

But the prosecutor knew of Gloria's less altruistic motivation; his own account of this event under cross-examination at the new trial hearing was:

> She was mad at Leman. She accused Leman of trumping up this story, getting Dagmar to trump up this

> story about her; and out of spite to Leman, she told us she wouldn't testify and said that Fein never said it—(3507)

The prosecutor had to acknowledge at the new trial hearing that none of these facts had been disclosed either to the defense or to the court (3509-11).

It is also relevant to note that the petitioner's counsel made every effort to obtain Gloria's attendance at the new trial hearing so that she could be examined, for the first time, about the suppressed facts. Three subpoenas were issued, but Gloria could not be found (3233, 3235-36). The prosecutor stated to the court on April 19, 1965 that he did not have any idea as to Gloria's whereabouts (3233); but on April 20, 1965 he testified that he had talked to her on the telephone "about maybe three or four weeks ago" (3386-88). This would have been just about the time, March 26, 1965, when the trial judge had written both sides setting a date for the new hearing (524B-525B). The prosecutor, knowing of the imminence of the new trial hearing, which was largely concerned with events in which Gloria participated, could not so easily have lost track of her whereabouts. The District Attorney had been served with petitioner's motion papers, and the prosecutor was fully aware that Dagmar's testimony in contradiction to that of Gloria, was to play a cardinal part in the hearing. Concerning these circumstances, District Judge Bartels contributes this observation in his first footnote: "Gloria was not available for this hearing and there is no showing that she would be available for any other hearing." (App. I, p. 2a.)

Further implementing the planned obliteration of every trace of Dagmar, the prosecution, particularly through

Detective Leman, frustrated petitioner's chances of locating her. Shortly before the trial, defense investigator Whelan heard of a "grapevine rumor" about a girl named "Dee", who might have knowledge about the case, and diligently attempted to obtain information about her (2924-25, 2930). He ultimately learned, after the trial had commenced, of the name of Dagmar, and then of Dagmar Finch, and that there was a rumor that she had told the District Attorney's office that Gloria had called her in order to borrow a car (2915-25). However, both the investigator as well as defense counsel were utterly unaware that Dagmar had married, that her name was now Mrs. Russell James Generazio, and that she had moved to New Jersey (3004-09, 2911-16, 2925-27, 2931). During the trial, this defense investigator told Detective Leman about the rumor he had heard concerning Dagmar Finch, and asked Leman for her telephone number and address, so that the investigator could interview her (2914-16, 2918, 2928, 2930, 2936). Leman refused this request, stating: "I am not at liberty to give it to you" (2929-30, 2936). The prosecutor, moreover, admitted at the new trial hearing that he himself had "become aware that the defense was looking for Dagmar" (3442-43). Nevertheless, in his zeal he continued on his course of suppressing any facts which were contrary to what was now his stubborn theory that the petitioner had killed the decedent.

District Judge Bartels wrote that "defense counsel knew about Dagmar". (App. I, p. 12a.) It is true that defense counsel in cross-examining Geri Boxer referred to a Dagmar Finch; but all that he was trying to do was to find out the extent of Geri's association with Gloria's stable of call girls (765-66). The name had no

particular significance to him; and he never brought it up again, not even when he subsequently cross-examined Gloria. Moreover, Geri denied knowing any girl by that name, although she admitted that she had once met a girl named Dee (765-66).

Judge, now Chief Judge, Fuld stated the suppression point with reference to Dagmar in a nutshell in the first paragraph of his dissenting opinion:

> I am reluctant to vote for affirmance in this case in view of the conceded nondisclosure and concealment by the prosecution of evidence which, in my judgment, might well have persuaded the jurors to reach a different verdict. Although the defendant points to several such items, I direct myself to but one of them. The record reveals that a Mrs. Dagmar Generazio had given the prosecution information which was at odds with the trial testimony of the People's key witness, Gloria Kendal, and that such information had not been disclosed to the jury or to the defense. Such information suggested—or, at least, so the jury could have found—that Gloria, rather than the defendant, was responsible for the murder and thus had a compelling motive to accuse him of the crime. Since the case against the defendant admittedly depended on the testimony of Gloria, there is heightened significance in the fact, likewise not revealed, that Gloria had actually been confronted with this information, as well as by Mrs. Generazio herself, in the district attorney's office immediately before she recanted (for the second time) her story against the defendant. (App. VI, p. 56a)

Circuit Judge Waterman found Chief Judge Fuld's dissenting opinion "most persuasive"; but nevertheless con-

curred in District Judge Bartels' opinion on the erroneous ground that this was a state rather than a federal prosecution:

> I find the dissenting opinion of Chief Judge Fuld of the New York Court of Appeals, 18 N.Y. 2d 162, 177, 272 N.Y.S. 2d 753, 763 (1966), most persuasive. I, with him, believe that it is possible that the jury might have reached a different verdict if the testimony of Dagmar Generazio gave at the post-trial hearing had been presented at the trial. Nevertheless, I recognize that petitioner was convicted in the New York state courts and not as a result of a federal prosecution, and as we are not therefore writing upon a clean slate, I am willing to concur in the affirmance of the decision below. (App. II, p. 23a)

On the prosecution's suppression of Dagmar and her account, District Judge Bartels has this comment: "Mr. Blinder, one of the defendant's counsel, stated at the post-trial hearing that he did not pursue the matter because he believed that if Dagmar were important to the defendant's case, the prosecutor would inform him of that relevance" (App. I, p. 13a). But this comment compounds the unconstitutionality of the prosecution's suppression of exculpatory testimony.

What Mr. Blinder actually said, in answer to one of the prosecutor's questions on cross-examination, was this: "A. And we [defense counsel] had assumed that if she was a valuable defense witness, you [the prosecutor] would have given us her name, as you had the name of Sandra Ede" (3026).

Defense counsel did place reliance on the prosecutor; and the prosecutor spoon-fed defense counsel just enough information to preserve this reliance. But the prosecutor did not tell defense counsel what he did not want them to know. He did not tell them about Dagmar and her confrontation with Gloria; and this despite the fact that he knew "that the defense was looking for Dagmar." (3442-43)

In this connection, Mr. Blinder further testified that he did not know of Mrs. Generazio until he read Mr. Louis Nizer's motion for a new trial (3003). This was weeks after the trial was over. Mr. Blinder and his co-counsel, Mr. Kleinman instructed their investigator Mr. Whelan to see if he could find a witness described as D (3004-05). Mr. Whelan reported back to them from time to time on his efforts to locate the witness described as D; but he was never able to trace her (3005). If the prosecution's suppression of Dagmar and her confrontation with Gloria do not make out a due process violation, then it would be difficult to conceive of a suppression of exculpatory evidence which would.

c. Sandra Ede. The prosecution's zealous suppression of Dagmar and her exculpatory testimony was but one of a number of such instances. It was simply the most glaring of the lot. Another instance of suppression was that of Sandra Ede's exculpatory testimony.

Gloria testified that when she received the call from the petitioner on the afternoon of October 10, 1963, the last date the decedent was seen alive, Sandra was in Gloria's apartment (1133-34). Geri testified that when she went to

Gloria's apartment on that day to meet Gloria she was told by Sandra over the intercom to meet Gloria at the Weissman apartment, and that was the occasion for her going there (705-707, 783-86).

After the prosecutor rested his case, he furnished defense counsel with Sandra's name and address; but at the same time he represented to the defense that when Sandra had been interviewed at the District Attorney's office, she "claimed to have had no recollection of the events that allegedly transpired on October 10, 1963" (1747). He asserted that "it is for that reason that the People did not call her as a witness" (1747). In the light of this representation, the defense did not call her as a witness either.

The prosecutor's representation about Sandra's lack of knowledge was, to say the least, disingenuous. Although Sandra had said that she had no recollection one way or the other about the events of October 10, 1963, she had also said that she was not in Gloria's apartment on October 10, had never given messages on the intercom (3175-76), could not have given a message to Geri to meet Gloria at the Weissman apartment because its existence was then unknown to her (3151), and that on the afternoon in question she was in her own apartment to see to the installation of a telephone.

Shortly after her first interrogation in March 1964, Sandra was brought to the District Attorney's office where she repeated what she had stated before, and added that she was not even certain that she had been in Gloria's apartment at all on October 10. In October she had moved out of her mother's home in the Bronx and taken an

apartment of her own on Palisades Avenue in Riverdale. On one day in either the first or second week of the month she had had a telephone installed in her new apartment. She knew that on that day she had not gone to Gloria's apartment. The telephone installation had taken much longer than it ordinarily would because of equipment difficulties, and it was late in the afternoon by the time it was completed. She could not possibly have gotten to East 73rd Street by 5:30 p.m., although she did not know what date it had been.

Detectives checked with the New York Telephone Company and discovered that her telephone had been installed on October 10, 1963. Sandra was again called to the District Attorney's office and learned this fact from the prosecutor. She again insisted that the installation had taken place in the afternoon so she could not have been in Gloria's apartment at all on October 10. At the new trial hearing she testified:

> A. The only thing I can remember about October 10th is that I had a telephone put in.
>
> Q. You had a telephone call—a telephone installed? A. In my apartment.
>
> Q. In your apartment? A. Yes (3160)
>
> * * *
>
> Q. Well, in that connection can you tell us what time the installation was completely finished? A. No. But I know I had a lot of difficulty because they brought the wrong phone and the wrong extension, so it took much longer than it ordinarily would.
>
> Q. Yes. And as a result of this difficulty that you remembered, can you give us any idea what time the telephone man completed his work and left? A. Sometime late in the afternoon. I don't remember exactly. (3163)

The Appellate Division itself found, based on the evidence given at the new trial hearing by, among others, Detective Leman (2358-61, 2413-14, 2420-21):

> On the motion for a new trial it was established that the district attorney interviewed Miss Ede and she refused to testify. She stated that if called she would testify that she was not in the apartment at the time and consequently never received the message; that she had never spoken to Miss Boxer on the intercom; and that on the afternoon in question she was in her own apartment to see to the installation of a telephone. (App. X, p. 75a)

This information was highly material. It cast further doubt upon the testimony and credibility of Gloria. It also cast doubt upon Geri and her account as to how she came to meet Gloria at the Weissman apartment on October 10.

The significance of Sandra's statements to the prosecution is manifest. Since she was not in Gloria's apartment and did not give Geri any message to go to the Weissman apartment, Geri must have gone there pursuant to instructions received from Gloria earlier that afternoon. It follows that Gloria was planning to be at the Weissman apartment prior to and at the very time Markowitz was allegedly murdered. This squarely corroborates the statement in the petitioner's affidavit, that it was Gloria who called him to the Weissman apartment, not he who called her.

d. The Bennett-McNair Testimony. A third instance of suppression occurred with reference to the exculpatory testimony of Mrs. Bennett and Mrs. McNair. Mrs. Bennett, a 32-year-old widow, her mother Mrs. Vera McNair, and her 3-year-old daughter Constance were tenants of an

apartment at 406 East 63rd Street. In the words of the Appellate Division:

> * * * They occupied an apartment in the rear of the building, whereas the "Weissman" apartment was in the front. They were interviewed by the police and told them that on the afternoon of October 10 they heard pistol shots which they believed emanated from the alleyway beneath their windows and in the rear of the house. Concededly the defense also interviewed these ladies before the trial but it is claimed they never revealed this information. (App. X, p. 77a)

The apartment which the two women occupied was on the third floor in the rear of the building, while the alleged murder apartment was on the fifth floor in the front of the building (2826-27). Thus it would seem that the shots which these women heard could not have been fired there (2826-27). Nevertheless, the prosecution concededly did not disclose the statements of these women to the defense (3413).

When Mrs. Bennett and Mrs. McNair furnished their information to the police and the prosecution, they were told in effect to keep "their mouths shut about this" (3413, 2349, 2840, 3076). At the new trial hearing, Detective Leman confirmed this; and admitted as well that he considered the information which they gave him to be "important" (2348).

Also, at the new trial hearing one of the petitioner's attorneys, who had interviewed the two women prior to the trial, emphatically and repeatedly swore that they at no time told him that they had heard shots on the after-

noon of the murder (2992). This was in conformity with the testimony of the women that they had been warned by the authorities not to divulge this information to anyone (2840, 3076). Indeed, Detective Leman and the prosecutor both conceded that they had given the women such a warning (3413, 2349). Consequently, it was not until after the trial that Mrs. Bennett and Mrs. NcNair believed it permissible to tell the petitioner's new counsel, who were interviewing all of the tenants of the building, about the shots that they had heard coming from the direction exactly opposite to that of the Weissman apartment.

Mrs. Bennett and Mrs. McNair further told the authorities about a trunk they saw in the building about the time of the murder, and one of them testified that she inadvertently (and contrary to instructions she had received from the authorities) discussed the trunk with defense counsel (2960). She maintained, however, that she immediately realized she had violated instructions and refused to furnish any further information to counsel (2961).

e. Detective Kelly's Ballistics Report. A fourth instance of suppression occurred when the prosecution failed to make known to the defense, Detective James E. Kelly's ballistics report (150B). This report concluded that there was no evidence of any bullets in the Weissman apartment. That tended to show that the shooting did not occur there, an inference supported by the Bennett-McNair testimony as well as other evidence.

The New York Court of Appeals took the view that the Kelly report was "fully available to defendant" (App. V, p. 45a). The New York Court of Appeals was mistaken.

Although the defense did serve a general subpoena for reports, which brought them physically into the courtroom, it could not, under the procedure applied, demand or inspect one of these reports unless the defense specifically requested it, and the defense could not request the Kelly report precisely because the prosecution had not disclosed its existence. (Of course, the prosecutor did not put Detective Kelly on the stand.)

Each of the prosecution's suppressions and concealments, and sponsorship of false or misleading testimony, constituted a violation of the petitioner's constitutional rights. Cumulatively, their effect was even greater. All of the suppressed or withheld evidence would clearly have assisted the defense in probing into the basic facts. Even more importantly, it might have persuaded the jury (a) that Gloria's twice-recanted, crucial testimony against petioner was false, (b) that Gloria, not petitioner, committed the murder, or, at least, was directly implicated in it, (c) that arrangements for disposing of the body were being made by Gloria or others before petitioner allegedly committed the crime, (d) that the crime occurred elsewhere than in the Weissman apartment, or (e) that, in any event, a reasonable doubt existed as to petitioner's guilt.

II—The Denial of Pretrial Discovery

The prosecution compounded its suppression of exculpatory evidence by opposing, and defeating, defense counsel's effort to have a pretrial examination of the bullets found in the decedent. One can ask why in the name of fundamental fairness defense counsel should not have been able to inspect these bullets.

Four bullets were found in the body of the decedent. The defense made a timely motion for pretrial discovery and inspection of the bullets (31A-38A), which the prosecution opposed (7A, 42A), and the court denied (30A). At the trial the prosecution's ballistic witness, Detective Walter J. Haase, in testifying about the bullets that he had examined, stated that they came "from a firearm with a right six rifling" (266), thereby conveying to the jury the impression that all four bullets were shot from a single firearm. Having been denied all opportunity for its own expert to inspect the bullets before the trial, the defense was in no position to assess Haase's testimony or to cross-examine him adequately. The prejudice became apparent later when, in support of the motion for a new trial, petitioner was able to tender expert evidence that Haase's testimony had been "erroneous and misleading," in that only one of the four bullets could be identified as having been fired from a firearm with a "right six rifling" (271B-273B). The New York Court of Appeals nevertheless held (first amended remittitur, App. VII, p. 59a) that petitioner's constitutional rights were not violated.

III—The Admission Into Evidence of Illegally Seized Material

The prosecutor further compounded his suppression of exculpatory evidence and his successful efforts in defeating defense counsel's motion to have a pretrial examination of the bullets found in the decedent, by an equally successful effort in getting into evidence a chair (Ex. 54) which had been illegally seized. It is not disputed that the chair, which had been stored in a storage warehouse under the petition-

er's pseudonym Weissman, was seized by detectives without a search warrant, without anyone's consent, and over the protest of the warehouse manager (1536-38, 390B-393B).

When the prosecutor first sought to introduce the chair in evidence, defense counsel objected specifically on the ground of unlawful search and seizure and he also moved to suppress the evidence "and if necessary to hold a hearing" (588-89). The prosecutor unequivocally represented to the court and defense counsel (590) that "the arrangements to take the furniture, including this chair, out of the apartment were made by this Gloria Kendal at the defendant's request." The court itself confirmed this, sandbagging defense counsel in the jury's presence with this question and comment:

> You want to have a nine day hearing on it? He says Gloria Kendal took the furniture and put it there at his request (590).

The court nevertheless grudgingly agreed to hold a hearing (591), which under the applicable New York statute, Code of Criminal Procedure, §813-d3 (App. XIII, p. 115a) was required to be held "in the absence of the jury." The prosecutor then stated that he would defer the introduction of the chair until a later time, and it was agreed and understood that petitioner would "have an opportunity to raise the question * * * later" (593). The prosecutor counted on the fact that the chair would ultimately slip into evidence; and this is exactly what happened.

Gloria testified that she arranged for the storage of the Weissman apartment furniture, including the chair, under

the name Weissman, pursuant to petitioner's instruction to her to "get rid of the furniture" (1168-74, 1191-94). At the conclusion of Gloria's testimony, the prosecutor again offered the chair in evidence, and the court received it over defense counsel's objection (1193). Defense counsel then moved to strike the chair from evidence and reminded the court of the prior understanding. Nevertheless, the court denied the motion summarily and without a hearing (1194-95).

The stage was now set for another injustice. The chair contained on its seat, who knows from what source, a speck of human blood so minute that it could not be typed (1719-20). The prosecutor in his summation now used this infinitesimal trace of human blood on the seat of the chair to corrobate Gloria's testimony that Mark Fein had murdered Markowitz in the Weissman apartment. He pointed to the chair as having been "tested and found to have human blood" on it (2146-47).

But on the new trial motion the petitioner submitted the affidavit of Dr. Sidney B. Weinberg, which categorically stated that, in view of the nature of the bullet wounds, the decedent must have shed a considerable amount of blood (230B-233B).

The Appellate Division itself acknowledged that the tiny speck on the seat of the chair was too minute to serve as proof that the homicide had taken place in the apartment:

> * * * From the medical testimony it is fairly conclusive that the deceased must have shed a considerable quantity of blood. None of the three witnesses who

were in the apartment on the evening of October 10 saw any blood on the furniture, and an examination of the furniture disclosed only one minute speck on a chair. This speck was so small that it could not be typed. As proof that the homicide took place in the apartment, it can be disregarded. (App. X, pp. 71a-72a)

Nevertheless the prosecutor got his conviction; and the state courts sustained it.

It was only in denying the motion for a new trial that the trial judge as an afterthought accepted the theory that the petitioner had "abandoned" the chair (App. XI, p. 85a). Relying solely on this ground, the New York Court of Appeals rejected the petitioner's constitutional contentions and upheld the prosecution's use of the evidence (App. V, p. 43a). The Second Circuit followed suit (App. I, p. 19a).

IV—New York's Unconstitutional Blue Ribbon Jury Statute

We are but halfway through the number of unconstitutional means that the People used in the instant case to get a judgment of conviction against the petitioner. Yet a fourth unconstitutional means was the use of a blue ribbon jury. The prosecution moved for a special jury under the New York Judiciary Law, §749-aa, as then in effect and applicable to counties having a population of one million or more inhabitants (*i.e.*, only certain counties in New York City). New York subsequently repealed the special jury statute in its entirety; but the repeal was effective September 1, 1965, and hence inapplicable to the petitioner's trial and conviction. The petitioner opposed the motion (173A-176A). He urged the court to follow *Schuster* v. *City of New York,* 25 Misc. 2d 670, 205 N.Y.S. 2d 190 (Sup. Ct.,

Kings County 1960), which, in denying the motion for a special jury in a civil case relied on the dissenting opinion in *Fay* v. *New York*, 332 U.S. 261 (1947). The petitioner quoted *Schuster*:

> There can be no true equal representation of a community if jurors are selected because of an alleged economic, social, or superior educational status. * * * There is no justification today for a jury system which divides citizens into special or blue ribbon jurors and ordinary or general jurors. Such discrimination short-circuits our democratic processes. * * * 25 Misc. 2d at 684, 205 N.Y.S. 2d at 205.

The petitioner then alleged (175A) that under the Constitution of the United States and the command of the Supreme Court of the United States, the New York special jury statute was "no longer valid or viable." The prosecution's motion was nevertheless granted (167A), and special jury was empaneled at the petitioner's trial (164A-166A, 177A-178A).

There were 400 persons on the special jury panels (250 on the original panel and 150 on the additional panel) from which the special jury was drawn; and it is obvious from an inspection of the lists that the panels were exceptionally top-heavy with professional and executive people, that they contained very sparse representation of ordinary workingmen or daily wage earners—particularly, "blue collar" workers, and that they contained only 11 women out of the 400 persons. The result was the selection of a jury composed of people likely to be unduly influenced by their moral predilections against the petitioner.

The petitioner argued the invalidity of New York's blue ribbon jury system both in the Appellate Division, First Department, as well as in the New York Court of Appeals. The First Department felt that the point did not merit discussion. 24 A.D. 2d at 33, 263 N.Y.S. 2d at 631. The New York Court of Appeals held:

> Defendant's contention that the use of a special jury deprived him of his constitutional right to a fair trial has been considered before and found to be without merit (*Fay* v. *New York*, 332 U.S. 261; *Moore* v. *New York*, 333 U.S. 565). 18 N.Y. 2d at 168, 272 N.Y.S. 2d at 756.

After the federal Supreme Court's denial of review on January 23, 1967, the petitioner by motion requested the New York Court of Appeals to amend its remittitur, so as to state expressly that the Court of Appeals had necessarily passed upon the question of the validity, under the Constitution of the United States, of the New York blue ribbon jury statute (former Section 749-aa of the New York Judiciary Law) and had determined that this statute was not unconstitutional. Petitioner's motion in the New York Court of Appeals set forth the facts relating to the presentation of the blue ribbon jury issue in the New York courts. The motion showed that the record (174A-175A) left no doubt that the validity of the New York blue ribbon jury statute, under the federal Constitution, had been expressly drawn in question by a timely pleading filed by the petitioner in the trial court in advance of trial. The motion also argued that the New York Court of Appeals, in deciding the blue ribbon jury question on the authority of *Fay* v. *New York*, 332 U.S. 261 (1947), and *Moore* v. *New York*, 333 U.S. 565 (1948), must surely have intended to deter-

mine that the New York blue ribbon jury statute, which was applied to petitioner, was a constitutional statute—that is, that the statute was not subject to constitutional infirmity under the provisions of the federal Constitution.

In the New York Court of Appeals the District Attorney vigorously opposed petitioner's motion to amend the remittitur. The District Attorney claimed, among other things, that the Court of Appeals had not passed upon the validity of the blue ribbon jury statute. The New York Court of Appeals, however, which was in a position to state authoritatively what it had passed upon, rejected the District Attorney's contention, and unanimously granted petitioner's motion on February 21, 1967. *People* v. *Fein,* 19 N.Y. 2d 691, 278 N.Y.S. 2d 880. The New York Court of Appeals held:

> Motion to further amend remittitur granted. Return of remittitur requested and, when returned, it will be further amended by adding thereto the following. Upon the appeal herein there was presented and necessarily passed upon the following question under the Constitution of the United States, viz.: Appellant contended that the order of the trial court, subjecting him to a trial before a special jury rather than a general jury, denied him a fair trial and deprived him of due process and the equal protection of the laws. The Court of Appeals held that appellant's constitutional rights were not violated and that former section 749-aa of the Judiciary Law authorizing such a trial is constitutional. (App. VIII, p. 62a)

V—The Trial Judge's Statements to the Jury Violated the Petitioner's Right of Silence.

Yet a fifth violation of the petitioner's constitutional rights occurred when the trial judge in his statements to the jury impaired the petitioner's privilege against self-incrimination in violation of the Fifth and Fourteenth Amendments. The trial judge misinformed the jury:

> When you get to the trial in a civil case and the defendant does not open his mouth, does not come forward to defend himself, he has to lose the case. That is civil law. But there is no such thing in criminal law. (59)

This gratuitous inaccuracy (even under "civil law" a defendant's silence is not fatal) was promptly followed by other remarks which heightened its prejudice:

> If a person accused of crime wishes to testify he has the privilege to do so. That he may exercise. He does not have to. And it may not be commented upon at any time if he does not do so. (60)

* * *

In his charge to the jury the trial judge again commented upon the failure of the petitioner to take the stand:

> Now, a defendant has a right to go upon the witness stand and testify in his behalf, if he chooses to do so. If he does not choose to do so, the law expressly provides that no presumption adverse to him is to arise from the mere fact that he does not place himself upon the witness stand. Therefore, there will be no discussion of any kind concerning that. (2179)

These statements in effect indicated to the jury that they could draw an adverse inference from the petitioner's failure to take the stand. Thus they violated his right of silence under the Fifth and Fourteenth Amendments.

VI—Prejudicial Publicity, Emanating from the Police and the Prosecution

The People engaged in yet one more violation of the petitioner's constitutional rights in order to get his conviction: prejudicial publicity. In this case, as in *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966), the news media had a field day. Immediately after the petitioner's arrest on February 21, 1964, the police launched an avalanche of charges, information and misinformation to the press which had the effect of convicting the petitioner in the eyes of the public before he was tried, and of vitiating his right to a fair trial. The police even made claims of evidence which the prosecution never was able to proffer at the trial. For example, the newspapers were given "information" that petitioner had put the murder gun in the duffle bag (103A). At the trial the prosecution was unable to produce any such evidence. Or again, information was given to the press that the rug cut out of the floor was "bloodstained" (103A). Even Carmella, alias Gloria testified, however, that she did not see any blood on the pieces of carpet (1355-56).

Indeed, the avalanche of charges, information and misinformation began with a two-hour press conference held by detectives on the morning of the arrest (59A).

These circumstances were brought to the court's attention in connection with a bail application filed by defense

counsel on March 2, 1964 (55A-89A). The court denied bail (89A, 7A), but took no steps whatsoever to halt the police press campaign nor to institute safeguards to assure that such severely prejudicial activities by the prosecution would cease. In fact they did not cease. Defense counsel on June 1, 1964, in renewing the bail application, brought to the court's attention two lengthy and lurid articles which had appeared in the June issues of *True Detective Magazine* and *Official Detective Stories* (90A-108A). Examination of these articles makes it clear that the authors were materially assisted by Detectives Leman and Lyons—the same police detectives who were later involved in the Dagmar episodes. These detectives were quoted at length in a demonstration of their ingenuity and brilliance in solving the case. Again, the court took no steps to bring a halt to such activities. Later, even during the trial, it would appear that the detectives maintained a close relationship with the press, and publicly prejudicial to the petitioner continued to be printed. A lengthy article was published in the *New York Herald Tribune* of November 18, 1964 (174B), which from its contents must surely have been inspired by Detective Lyons. Because of its particularly prejudicial nature, defense counsel promptly brought it to the court's attention (1675-78). One of the jurors actually admitted having seen this article, though he claimed he had not "read" it (1677). Despite this, and despite the presence of alternate jurors from whom a substitute juror could have been selected (1678), the court did not remove that juror.

The petitioner's new trial motion urged the constitutional question under the due process clause of the Fourteenth Amendment (28B, 140B-147B, 154B-174B). The New York Court of Appeals (App. V, p. 43a) sustained the trial judge's ruling (App. XI, p. 85a) rejecting this contention.

B. Basis for Federal Jurisdiction

The basis for federal jurisdiction in the federal court of first instance is 28 U.S.C. §2254. All six of the petitioner's constitutional deprivations were argued in the state courts. All six were argued before Judge Palmieri, either on the petitioner's request for a writ of habeas corpus or on his motion for a certificate of probable cause. Indeed, the petitioner in support of his motion for a certificate of probable cause submitted to Judge Palmieri as well as served on the respondent, the page proof of what became his brief in the United States Court of Appeals for the Second Circuit.

REASONS FOR GRANTING THE WRIT

I

The prosecution's suppression of exculpatory evidence, whether due to inadvertence, negligence, willfulness, or an excess of zeal, and whether or not defense counsel made a request for such evidence, and whether more diligent or more fortunate defense counsel might possibly have come upon such evidence on his own, is a violation of the due process clause of the Fourteenth Amendment.

The trial of a criminal case is no longer a game. It is an effort to do justice. To an ever greater extent, prosecutors have been required to furnish defense counsel with exculpatory evidence in their possession. In *Brady* v. *Maryland*, 373 U.S. 83 (1963), the federal Supreme Court explained its progression from *Mooney* v. *Holohan*, 294 U.S. 103 (1935), through *Pyle* v. *Kansas*, 317 U.S. 213 (1942), to the point where any suppression of evidence favorable to the defense by a prosecutor constitutes a violation of due process. In *Brady* the petitioner and a companion Boblit were involved in a murder. Boblit gave a statement to the prosecution that he was the one who did the actual killing. This statement was withheld by the prosecution. Both the Maryland Court of Appeals as well as the United States Supreme Court ruled that this suppression constituted a violation of due process. The federal Supreme Court held and said:

> We agree with the Court of Appeals that suppression of this confession was a violation of the Due Process Clause of the Fourteenth Amendment. The

> Court of Appeals relied in the main on two decisions from the Third Circuit Court of Appeals—*United States ex rel. Almeida* v. *Baldi,* 195 F. 2d 815, 33 A.L.R. 2d 1407, and *United States ex rel. Thompson* v. *Dye,* 221 F. 2d 763—which, we agree, state the correct constitutional rule. 373 U.S. at 86.

The law on the duty of the prosecution to disclose to the defense evidence favorable to it, Judge, now Chief Judge, Fuld stated well in two paragraphs in his dissenting opinion in the instant case:

> The concept of fairness, of due process, imposes upon the prosecution a duty to apprise the defense of evidence favorable to the accused, particularly when such evidence contradicts the testimony given by the People's witnesses in open court. (See *Brady* v. *Maryland,* 373 U.S. 83, 87; *Napue* v. *Illinois,* 360 U.S. 264; *Alcorta* v. *Texas,* 355 U.S. 28; *Mooney* v. *Holohan,* 294 U.S. 103; *Levin* v. *Katzenbach,* 363 F.2d 287; *Barbee* v. *Warden,* 331 F.2d 842; *People* v. *Robertson,* 12 N.Y. 2d 355; *People* v. *Zimmerman,* 10 N.Y. 2d 430; *People* v. *Savvides,* 1 N.Y. 2d 554.) This duty persists even though the defense might, by dint of a little more effort, have independently uncovered the evidence in question and even though the district attorney regards it as lacking in probative force or worthless. The prosecution is not privileged "to decide for the court what is admissible or for the defense what is useful". (*Griffin* v. *United States,* 183 F.2d 990, 993.)
>
> The argument that disclosure would not have changed the verdict "overlooks the variant functions to be performed by jury and reviewing tribunal". (*People* v. *Savvides,* 1 N.Y. 2d 554, 557, *supra.*) It is for jurors, not judges of an appellate court such as ours, to decide the issue of credibility, and we should be particularly observant of this principle in the case

> before us, where disclosure might well have impeached the one witness without whom there would admittedly have been no prosecution. In this view, it "matters little" that the district attorney's silence was not the result of guile or a desire to prejudice. (*People* v. *Savvides*, 1 N.Y. 2d 554, 557, *supra*.) "The principle of *Mooney* v. *Holohan* [294 U.S. 103, *supra*]," as the Supreme Court has pointedly observed (*Brady* v. *Maryland*, 373 U.S. 83, 87, *supra*), "is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused."
>
> I would reverse and order a new trial. (App. VI, pp. 56a-57a, 18 N.Y. 2d at 177-78, 272 N.Y.S. 2d at 764, 281 N.E. 2d at 281-82.)

Nor is a request for the specific exculpatory evidence required before the government has a duty to disclose. As Mr. Justice Fortas stated in his concurring opinion in *Giles* v. *Maryland*, 386 U.S. 66, 102 (1967):

> * * * I see no reason to make the result turn on the adventitious circumstances of a request. If the defense does not know of the existence of the evidence, it may not be able to request its production. A murder trial—indeed any criminal proceeding—is not a sporting event.

Nor is it the prosecutor's job, as Judge, now Chief Judge, Fuld also indicated in his dissenting opinion in the instant case to pass upon the worth of exculpatory evidence or its credibility. That job is for defense counsel and the jury. Or as this Court put it in *Brady* v. *Maryland*, 373 U.S. 83, 88 (1963), a course which permits a prosecutor to pass on the worth or credibility of exculpatory evidence "casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice."

District Judge Bartels writing for the Second Circuit chose to treat this point as if it were a motion for a new trial based on newly discovered evidence (App. I, p. 15a). He is mistaken. It is not. This is a case of suppression; and presents a federal constitutional question governed by *Chapman* v. *California,* 386 U.S. 18 (1967), and the cases which followed it. *Chapman* specifically held "that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." 386 U.S. at 24.

The Court has repeatedly reaffirmed its *Chapman* ruling. In *Burgett* v. *Texas,* 389 U.S. 109 (1967), the Court reversed a conviction because of a reference to a constitutionally infirm prior criminal conviction, and did so despite the fact that the trial judge had instructed the jury to disregard it.

In *Anderson* v. *Nelson,* 390 U.S. 523, 525 (1968), the Court ordered habeas corpus relief because the Court could not say that a violation of one of petitioner's constitutional rights was "harmless beyond a reasonable doubt," in the words of *Chapman* v. *California,* 386 U.S. 18, 24 (1967).

Again, in *Fontaine* v. *California,* 390 U.S. 593 (1968), the Court ordered habeas corpus relief for a state prisoner because the Court could not say that a violation of one of the petitioner's constitutional rights was harmless beyond a reasonable doubt. The Court reasoned:

> Subsequently, we decided *Chapman* v. *California,* 386 U.S. 18 (1967), which disapproved of California's harmless error rule as applied to federal constitutional errors. Thereafter, we granted a petition for a writ

> of certiorari in the instant case, vacated the judgment below, and remanded for further consideration in light of *Chapman.* 386 U.S. 263 (1967). On remand, the District Court of Appeals reinstated its former opinion except that it rewrote the portion dealing with harmless error. This time it recited that the constitutional error in this case was harmless "beyond a reasonable doubt"—the standard announced in *Chapman.*
>
> * * *
>
> * * * it was error for the court below to hold that the comments of the prosecutor and the trial judge were harmless "beyond a reasonable doubt."
>
> * * *
>
> * * * In these circumstances, the State has not met its burden of proving beyond a reasonable doubt that the erroneous comments and instruction did not contribute to petitioner's conviction. *Chapman* v. *California,* 386 U.S., at 24, 25-26.

390 U.S. at 595, 596.

The California Supreme Court finally gave *Chapman* v. *California,* 386 U.S. 18 (1967), full application in *People* v. *Johnson,* 68 Cal. Rptr. 599, 441 P. 2d 111 (1968), *cert. denied,* 393 U.S. 1051 (1969).

The effect of the formulation of District Judge Bartels would be that, while issues of credibility are normally to be tried by the jury in criminal cases, nevertheless an exception exists which permits the judge to determine such credibility matters once and for all when, as here, the prosecution has suppressed or concealed or withheld material evidence until after the trial. This would be not only a fundamental invasion of the right to trial by jury and a violation of the due process clause, but a violation of the equal protection clause as well. For then the question

would go not only to whether the Constitution requires a state to accord a Sixth Amendment type of jury trial to a defendant charged with murder, but also "to the nature of the jury trial which the Fourteenth Amendment commands when trial by jury is what the State has purported to accord". *Turner* v. *Louisiana,* 379 U.S. 466, 471 (1965). It would involve a totally arbitrary and unreasonable classification. Compare *Baxstrom* v. *Herold,* 383 U.S. 107 (1966). It would take away a substantial portion of the benefits of trial by jury from those defendants, and only from those defendants, who had the misfortune to be victimized by the prosecution's wrongful conduct. Moreover, it would reward the prosecutor for indulging in such wrongful conduct. If the prosecutor's suppression were not detected, the conviction would stand; and if it were detected, the prosecutor would then obtain a determination solely from the judge, rather than from a jury, as to the credibility of the witnesses he concealed. Surely there is no room under the Constitution for such a scheme.

II

The denial of pretrial discovery and inspection of the bullets found in the decedent violated the due process clause of the Fourteenth Amendment.

We submit that the traditional view that denials of pretrial discovery lack constitutional dimension is anomalous, unjust, obsolete, and contrary to the modern trend towards full disclosure. The modern trend is indicated for example in the enlarged discovery rights in federal criminal trials in the 1966 amendments to Rule 16 of the Federal Rules of

Criminal Procedure. Moreover, a few days before this amendment went into effect, the Court in *Dennis* v. *United States,* 384 U.S. 855, 870-71 (1966), took occasion to praise this amendment and the broadening of disclosure in criminal cases. The Court, after commenting that lower federal courts had made grand jury testimony available to defendants in a variety of circumstances continued:

> These developments are entirely consonant with the growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice. This realization is reflected in the enactment of the so-called Jencks Act, 18 U.S.C. §3500 (1964 ed.), responding to this Court's decision in *Jencks* v. *United States,* 353 U.S. 657, which makes available to the defense a trial witness' pretrial statements insofar as they relate to his trial testimony. It is also reflected in the expanding body of materials, judicial and otherwise, favoring disclosure in criminal cases analogous to the civil practice.[17]

Then in footnote 17 the Court praised the amendments to Rule 16:

> 17. See, *e.g.,* the Amendments to Rule 16 of the Federal Rules of Criminal Procedure, approved by this Court on Febary 28, 1966, and transmitted to Congress, which authorize discovery and inspection of a defendant's own statements, the results of various tests, and the recorded testimony of the defendant before the grand jury (and see the Advisory Committee's Note thereon). See also, cases anticipating this broadening of criminal discovery: for example, *Cicenia* v. *Lagay,* 357 U.S. 504, 511; *United States* v. *Peace,* 16 F.R.D. 423 (D.C. S.D.N.Y. 1954); *United States* v. *Willis,* 33 F.R.D. 510 (D.C. S.D.N.Y. 1963); *United States* v. *Williams,* 37 F.R.D. 24 (D.C. S.D.N.Y. 1965); *United States* v. *Nolte,* 39 F.R.D. 359 (D.C. N.D. Cal. 1965); *State* v. *Johnson,* 28 N.J. 133, 145 A.2d 313 (1958); *People ex rel. Lemon* v. *Supreme Court,* 245 N.Y. 24, 156 N.E. 84 (1927).
>
> Among the commentators who have argued in favor of broadening criminal discovery are Brennan, The Criminal Prosecu-

tion: Sporting Event or Quest for Truth? 1963 Wash. U.L.Q. 279; Traynor, Ground Lost and Found in Criminal Discovery, 39 N.Y.U.L. Rev. 228 (1964); Goldstein, The State and the Accused: Balance of Advantage in Criminal Procedure, 69 Yale L.J. 1149 (1960); Note, Developments in the Law—Discovery, 74 Harv. L. Rev. 940, 1051-1063 (1961). Of particular relevance to the question of grand jury secrecy are: Sherry, Grand Jury Minutes: The Unreasonable Rule of Secrecy, 48 Va. L. Rev. 668 (1962); and Calkins, Grand Jury Secrecy, 63 Mich. L. Rev. 455 (1965).

Subsequently, in *Will* v. *United States*, 389 U.S. 90 (1967), the Court overturned an order of the Seventh Circuit which would have prevented a federal district judge from requiring the government to furnish a list of its informants to a defendant.

In the instant case, petitioner's inspection of the bullets before trial was important to the preparation of his defense. It was important in order for him to have "the scales evenly balanced in his contest with the state". See Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 Wash U.L.Q. 279, 285; Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 Yale L.J. 1149, 1192 (1960). The murder weapon or weapons were never found, so that the bullets were of crucial importance. The impression conveyed to the jury by the prosecution's expert witness that all four bullets had been fired from one firearm might have been disproved if such discovery had been permitted. Moreover, evidence tending to show that there was more than one weapon would have compelled submission to the jury of the requested accomplice instruction with respect to Gloria. Nor could the legitimate interests of the prosecution have been prejudiced by the granting of such limited discovery.

The circumstances make this murder case a most appropriate vehicle for articulating the limitations which the due process clause imposes on the states in the interests of achieving a substantial degree of fundamental fairness in this area.

III

The admission into evidence over objection and without a hearing of a chair obtained as a result of an illegal search and seizure violated the Fourth and Fourteenth Amendments.

The chair (Ex. 54) was illegally seized, without a search warrant, without anyone's consent, and over the protest of the warehouse manager. Moreover, this illegal search and seizure was directed specifically against the petitioner, whom the police had already arrested. Nor was there the slightest showing of necessity or emergency to justify this arbitrary and unreasonable seizure. The police had seen the chair in the warehouse about two weeks before (1536), and had had ample time to apply for a search warrant if they thought they were entitled to one.

There is likewise no doubt but that the Court under the due process clause of the Fourteenth Amendment has made the Fourth Amendment as fully applicable to the states as to the federal government. A large step in this direction was *Mapp* v. *Ohio,* 367 U.S. 643 (1961), where the Court held that material illegally seized by state officers was inadmissible even in a state court proceeding. This involved a major change; for in *Mapp* v. *Ohio,* 367 U.S. 643 (1961), the Court overruled its earlier and oftcited case to the contrary, *Wolf* v. *Colorado,* 338 U.S. 25 (1949). The Court

completed the change in *Ker* v. *California,* 374 U.S. 23 (1963), where it announced that its *Mapp* holding was enforceable against the states not only by the same sanction of exclusion as against the federal government, but also by the same constitutional standard prohibiting unreasonable searches and seizures.

The instant state case thus presents the question whether the petitioner, who was already charged and in custody, has standing to object to an illegal search and seizure because the search was directed specifically against him. One would have thought that under *United States* v. *Jeffers,* 342 U.S. 48 (1951), *Jones* v. *United States,* 362 U.S. 257 (1960), *Stoner* v. *California,* 376 U.S. 483 (1964), and *Mancusi* v. *DeForte,* 392 U.S. 364 (1968), he did. However, the lower courts held otherwise.

In *Jones* v. *United States,* 362 U.S. 257 (1960), the Court, while it was able to rest its ground of decision on possessory considerations, also declared that a defendant does have standing if he was the target of the search and seizure, that is, if he was the victim of the search. The Court after quoting Rule 41(e) of the Federal Rules of Criminal Procedure continued:

> In order to qualify as a "person aggrieved by an unlawful search and seizure" one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else. * * *
>
> Ordinarily, then, it is entirely proper to require of one who seeks to challenge the legality of a search

> as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy. * * *.
>
> * * *
>
> * * * We are persuaded * * * that it is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical. * * *

362 U.S. at 261, 266.

Then in *Mancusi* v. *DeForte,* 392 U.S. 364 (1968), the Court in its full application of the Fourth Amendment to the states under the due process clause of the Fourteenth Amendment, extended *Jones* v. *United States,* 362 U.S. 257 (1960), to give standing to an indicted union official to object at his state trial to documents seized from the union office that he shared with others. Mr. Justice Black, in a dissent which Mr. Justice Stewart joined, complained that the Court was preparing the way to use *Jones* to eliminate entirely the requirement for standing:

> * * * In fact the Court's opinion indicates to me that the Court is preparing the way to use *Jones* to eliminate entirely the requirement for standing to raise a search and seizure question and to permit a search to be challenged at any time, at any place, and under all circumstances, regardless of the defendant's relationship to the person or place searched or to the things seized. * * *

392 U.S. at 376.

However, from the Court's recent opinions in *Alderman* v. *United States,* 37 U.S.L. Week 4189 (March 10, 1969), it would appear that the question of standing of one against whom an illegal search was directed is still open. Mr. Justice Fortas in Part II (in which Mr. Justice Douglas joined) of his opinion, concurring in part and dissenting in part, found it necessary, after quoting from *Jones,* and underscoring the words *"one against whom the search was directed,"* to say:

> It is my position that this quotation read in light of the Court's rejection of property concepts, requires that we include within the category of those who may object to the introduction of illegal evidence "one against whom the search was directed." Such a person is surely "the victim of an invasion of privacy" and a "person aggrieved," even though it is not his property that was searched or seized. As I think the Court recognized in *Jones,* unless we are to insist upon property concepts, it is enough to give him "standing" to object that the government agents conducted their unlawful search and seizure in order to obtain evidence to use against him. The Government violates his rights when it seeks to deprive him of his liberty by unlawfully seizing evidence in the course of an investigation of him and using it against him at trial. See *Rosencranz* v. *United States,* 334 F.2d 738, 741 (C.A. 1st Cir. 1964) (concurring opinion).

37 U.S.L. Week at 4198.

Indeed, Mr. Justice Fortas went further and indicated that he might be persuaded to eliminate entirely the requirement of standing:

> * * * The Fourth Amendment, unlike the Fifth, is couched in terms of a guarantee that the Government

> will not engage in unreasonable searches and seizures. It is a general prohibition, a fundamental part of the constitutional compact, the observance of which is essential to the welfare of all persons. Accordingly, commentators have urged that the necessary implication of the Fourth Amendment is that any defendant against whom illegally acquired evidence is offered, whether or not it was obtained in violation of his right to privacy, may have the evidence excluded. It is also contended that this is the only means to secure the observance of the Fourth Amendment.
>
> I find these arguments cogent and appealing. * * *

37 U.S.L. Week at 4197.

The California Supreme Court has in fact taken this advanced position: it has held that a defendant has standing to challenge the admissibility of evidence produced by an illegal search and seizure, irrespective of whether the particular defendant had any kind of possessory interest or was the target of the search. *People* v. *Martin,* 45 Cal. 2d 755, 290 P. 2d 855 (1955); *cf. People* v. *DeFilippis,* 34 Ill. 2d 129, 134-135, 214 N.E. 2d 897, 900 (1966).

Even assuming Gloria's testimony about the chair to be correct and conclusive, there are decisions which have held, on facts more compelling for the prosecution, that there was no "abandonment" for Fourth Amendment purposes. *Hobson* v. *United States,* 226 F.2d 890 (8th Cir. 1955); *Work* v. *United States,* 243 F.2d 660 (D.C. Cir. 1957); *United States* v. *Merritt,* 293 F.2d 742 (3d Cir. 1961).

In any event, under the Constitution, the petitioner was at least entitled to a hearing on the unlawfulness of the seizure of the chair, and at such a hearing any factual

issue of abandonment, if relevant, could have been fully explored and actually and reliably determined. The New York courts totally denied the petitioner such a hearing, despite a New York statute which mandated it, and despite a distinct understanding with the trial judge and the prosecutor that a hearing would be held. This contravened the most basic principles of due process and fair play. It plainly conflicted with *Jackson* v. *Denno,* 378 U.S. 368, 376-77, 380 (1964) where, in connection with New York's procedure for determining admissibility of confessions, the Court held that the defendant had a "constitutional right at some stage in the proceedings to object to the use of the confession and to have a fair hearing and a reliable determination on the issue of voluntariness" as well as "a fair hearing in which both the underlying factual issues and the voluntariness of his confession are actually and reliably determined". Certainly the applicable principles can be no different for an unlawful search and seizure.

Petitioner should have been accorded a fair hearing in which both the lawfulness of the seizure and the underlying factual issues, including any claim that he abandoned the seized property, were "actually and reliably determined". In was in effect so decided by the Ninth Circuit's decision in *Cunningham* v. *Heinze,* 352 F.2d 1, 3 (9th Cir. 1965), *cert. denied,* 383 U.S. 968 (1966):

> * * * The district court is therefore required to hold an evidentiary hearing "unless the state-court trier of facts has after a full hearing reliably found the relevant facts". Townsend v. Sain, 372 U.S. 293, 313, 83 S.Ct. 745, 757, 9 L.Ed. 2d 770 (1963).

The trial court never even intimated during the trial that it was basing its ruling on the ground that the chair had been abandoned; its abandonment theory first appeared in its opinion denying the motion for new trial. If the abandonment issue had been raised, Gloria could have been fully cross-examined on it. Moreover, if the court had proceeded to conduct the hearing it was obligated and had committed itself to conduct, then the petitioner, besides adducing other evidence, could have testified in the absence of the jury as to whether he had abandoned the chair or whether the chair had merely been placed in storage for him. Denial of the hearing prevented the petitioner, who was the only other party to the alleged conversation, from testifying as to what occurred. A trial judge who has absolutely refused to conduct such a hearing cannot justly determine that abandonment occurred. A state court criminal proceeding which rides roughshod over the right to a hearing should not be allowed to stand.

The lower courts by their decisions in the instant case have utilized the doctrine of no standing as a handy means for circumventing the policies which *Mapp* and succeeding cases were intended to effectuate.

The teaching of the lower courts for the New York police—one of the largest police forces in the world—is that any search and seizure conducted in contempt of the Constitution will nevertheless get by if afterwards it can be shown that the defendant does not have an interest in the premises searched or the property seized. "Moreover, such a limitation virtually invites law enforcement officers to violate the rights of third parties and to trade the escape of a criminal whose rights are violated for the conviction of

others by the use of the evidence illegally obtained against them.'' *People* v. *Martin,* 45 Cal. 2d 755, 760, 290 P. 2d 855, 857 (1955).

IV

New York's blue ribbon jury statute, under which the instant case was tried, violates the Sixth and Fourteenth Amendments.

The specifics of the Sixth Amendment have now been made fully applicable to the states by the due process clause of the Fourteenth Amendment. This includes the Sixth Amendment's guarantee of the right to trial by jury. *Parker* v. *Gladden,* 385 U.S. 363 (1966); *Duncan* v. *Louisiana,* 391 U.S. 145 (1968). In *Duncan* the appellant was convicted of a simple battery, a misdemeanor; and received a sentence of 60 days and a fine of $150.00. However, his sentence could have been as much as two years. The Court held that he was entitled to a jury trial, saying through Mr. Justice White:

> * * * Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee. * * *

391 U.S. at 149.

The process of making the specifics of the Sixth Amendment fully applicable to the states began with *Gideon* v. *Wainwright,* 372 U.S. 335 (1963), and *Pointer* v. *Texas,* 380 U.S. 400 (1965), where the Court made the Sixth Amend-

ment's rights to counsel and to confrontation as fully applicable to the states as to the federal government. *Gideon* v. *Wainwright,* like *Mapp* v. *Ohio,* wrought a great change, and, like *Mapp,* overruled an earlier and much cited case, *Betts* v. *Brady,* 316 U.S. 455 (1942), which had confined the Fourteenth Amendment's due process right to counsel in state noncapital cases to those instances where the surrounding circumstances demonstrated that the accused could not adequately present his own defense.

Accordingly, the systematic exclusion of any recognizable, identifiable group, be it racial, ethnic, sexual, religious, ethical, economic, social, political, or geographical, within the community from which state juries are drawn, violates the Sixth Amendment's requirement for trial by an impartial jury. Women constitute such a group. Daily wage earners constitute such a group. And individuals with scruples against capital punishment constitute such a group. Moreover, the last group comprises half of the community—and it is growing.

The most numerous cases are those involving the exclusion of Negroes from grand or petit juries, or both. See, *e.g., Sims* v. *Georgia,* 389 U.S. 404 (1967) (grand and petit juries); *Jones* v. *Georgia,* 389 U.S. 24 (1967) (grand and petit juries); *Whitus* v. *Georgia,* 385 U.S. 545 (1967) (grand and petit juries); *Arnold* v. *North Carolina,* 376 U.S. 773 (1964) (grand juries); *Eubanks* v. *Louisiana,* 356 U.S. 584 (1958) (grand juries); *Smith* v. *Texas,* 311 U.S. 128 (1941) (grand juries); *Norris* v. *Alabama,* 294 U.S. 587 (1935) (grand juries); *Strauder* v. *West Virginia,* 100 U.S. 303 (1879) (grand and petit juries).

The exclusion of women from jury service was involved in *Ballard* v. *United States,* 329 U.S. 173 (1946), and *Glasser* v. *United States,* 315 U.S. 60 (1942).

In *Thiel* v. *Southern Pacific Co.,* 328 U.S. 211 (1946), the Court proscribed the exclusion of daily wage earners as a class. *Accord, Labat* v. *Bennett,* 365 F.2d 698 (5th Cir. 1966), *cert. denied,* 386 U.S. 991 (1967). Indeed, in *Thiel* the Court stated that the systematic exclusion of members of any of these groups was illegal:

> * * * the economic, social, religious, racial, political and geographical groups of the community; * * *

328 U.S. at 220.

In *Labat* v. *Bennett,* 365 F.2d 698 (5th Cir. 1966), *cert. denied,* 386 U.S. 991 (1967), the Fifth Circuit's majority opinion, in setting aside Louisiana state court convictions held:

> The exclusion of daily wage earners *as a class* violates the petitioners' due process and equal protection rights to an impartial jury representing a cross-section of the community.

365 F.2d at 719-20.

The concurring opinion on behalf of Judges Bell and Coleman was rested solely on this ground. 365 F. 2d at 739-42. It thus seems evident that, in the states comprising the Fifth Circuit, a state court blue ribbon jury system could not now survive the scrutiny of the Fifth Circuit. The result should not be different elsewhere.

In *Hernandez* v. *Texas,* 347 U.S. 475 (1954), the Court invalidated the systematic exclusion of persons of Mexican descent from grand and petit juries.

In *Rabinowitz* v. *United States*, 366 F.2d 34 (5th Cir. 1966), the Fifth Circuit held that too much of a reliance on the "key man" system of juror selection, and too little of an effort to obtain a fair cross-section of the community required the dismissal of the indictments in that case.

In the light of these developments, *Moore* v. *New York*, 333 U.S. 565 (1948), and *Fay* v. *New York*, 332 U.S. 261 (1947), the two five-to-four decisions of more than 20 years ago, on which the New York Court of Appeals placed its entire reliance in sustaining New York's blue ribbon jury statute (App. V, p. 43a), and on which District Judge Bartels placed his reliance (App. I, p. 20a), no longer represent the law. The constitutional doctrine which should now commend itself to the Court is the doctrine so powerfully expressed in the dissenting opinion in *Fay* (332 U.S. at 299-300):

> * * * there is a constitutional right to a jury drawn from a group which represents a cross-section of the community. And a cross-section of the community includes persons with varying degrees of training and intelligence and with varying economic and social positions. Under our Constitution, the jury is not to be made the representative of the most intelligent, the most wealthy or the most successful, nor of the least intelligent, the least wealthy or the least successful. It is a democratic institution, representative of all qualified classes of people. * * *

and in the dissenting opinion in *Moore* (333 U.S. at 570):

> The vice lies in the very concept of "blue ribbon" panels—the systematic and intentional exclusion of all but the "best" or the most learned or intelligent of the general jurors. Such panels are completely at war

> with the democratic theory of our jury system, a theory formulated out of the experience of generations. * * *

The *Fay* majority placed some reliance, 332 U.S. at 285-86, on the fact that the data there proffered concerning actual operation of the blue ribbon jury system consisted of New York Judicial Council studies for the period 1933-1934, instead of later years. But subsequent to *Fay* another Judicial Council study, made in 1952, fully confirmed the discriminatory and unfair operation of this New York special jury scheme, and its continued and inherent departure from the principle that juries should be drawn from a representative cross-section of the community.

Thus the 1952 study showed (App. XII, p. 104a) that "the most significant difference between the special and general panel is occupational" and that "those who may be called working people * * * constitute a larger portion of the general panel than they do of the special panel." Thus in New York County, business people made up 47% of the special jury panel, although they made up only 23% of the general jury panel. On the other hand, the lower economic groups, skilled and unskilled laborers, and the like, made up 7% of the special jury panel as against 17% of the general jury panel. *New York Judicial Council Report* 165 (1952). This discriminatory operation of the special jury was particularly marked in the present case. The 1952 study likewise reported (App. XII, p. 106a) that in New York County women constituted 2% of the special panel but 11% of the general panel; in this case, too, the exceptionally low representation of women (11 out of 400 in the two special panels) has been maintained.

New York's blue ribbon jury system resulted in panels which not only severely discriminated against lower economic groups and women, but also totally discriminated against scrupled individuals. Indeed, the object of this statute was to effect the exclusion from blue ribbon jury panels of all those individuals who had conscientious scruples against capital punishment. See *People* v. *Hall,* 169 N.Y. 184, 196 (1901); *People* v. *Blanchfield,* 45 Misc. 2d 536, 538-39, 257 N.Y.S. 2d 438, 441-2 (Sup. Ct. N.Y. County 1965).

But as Mr. Justice Stewart pointed out in the Court's opinion in *Witherspoon* v. *Illinois,* 391 U.S. 510, 519-20 (1968), scrupled jurors constitute about one-half of the people in this country: "Yet, in a nation less than half of whose people believe in the death penalty,[16] a jury composed exclusively of such people cannot speak for the community." In footnote 16 he added:

> It appears that, in 1966, approximately 42% of the American public favored capital punishment for convicted murderers, while 47% opposed it and 11% were undecided. Polls, International Review on Public Opinion, Vol. II, No. 3, at p. 84 (1967). In 1960, the comparable figures were 51% in favor, 36% opposed, and 13% undecided. Ibid.

On November 3, 1964, while the Mark Fein trial was under way, the People of the State of Oregon at a general election voted to abolish capital punishment by 455,654 to 302,105, or more than 60%. Ore. Laws 6 (1965). Thus New York's blue ribbon juries represented only a small fractional section of the community.

But as both Mr. Justice Stewart in the Court's opinion in *Witherspoon,* and Mr. Justice Douglas in his concurring opinion, recognized in citing *Glasser* v. *United States,* 315 U.S. 60, 84-86 (1942), the Sixth Amendment's provision for trial by an impartial jury, made fully applicable to the states by the due process clause of the Fourteenth Amendment, requires a panel which fairly represents "a cross-section of the community." 315 U.S. at 86.

Even Mr. Justice White in his dissenting opinion in *Witherspoon* recognized that jury panels from which jurors who determine guilt or innocence are chosen, must represent a fair cross-section of the community, when he commented in his first footnote:

> While I agree generally with the opinion of MR. JUSTICE BLACK, and so have joined it, I would not wholly foreclose the possibility of a showing that certain restrictions on jury membership imposed because of jury participation in penalty determination produce a jury which is not constitutionally constituted for the purpose of determining guilt.

391 U.S. at 541, n. 1.

Moreover, everybody in New York but the courts recognized that blue ribbon juries were not impartial. Everybody but the courts knew that blue ribbon juries were handpicked by a special system which discriminated against laborers and other members of the lower economic classes. Everybody knew that blue ribbon juries did not represent a cross section of the community. Everybody knew that the blue ribbon jury system assured the state of juries whose members were partial to the prosecution on the issue of guilt or innocence.

Prosecutors knew; for in the ten-year period from 1941 to 1950 they requested every special jury that was impanelled, save one. *New York Judicial Council Report* 164 (1952).

Counsel for defendants knew; for in this ten-year period, with but this single exception, they never requested a blue ribbon jury.

The New York Judicial Council knew; for it repeatedly requested the repeal of New York's blue ribbon jury statute.

The Committee on Criminal Courts of the Association of the Bar of the City of New York knew; for it favored the abolition of blue ribbon juries.

The New York courts themselves began to recognize the defects of the blue ribbon jury system when Mr. Justice Abraham N. Geller in *People* v. *Blanchfield*, 45 Misc. 2d 536, 257 N.Y.S. 2d 438 (Sup. Ct. N.Y. County 1965), although granting a motion for a special jury, in effect declared invalid the machinery set up by the statute for selecting the blue ribbon jury.

Senator Jeremiah B. Bloom, the sponsor of the legislation which abolished New York's blue ribbon jury system, knew; for in his memorandum in support of this legislation he stated, referring to New York's blue ribbon statute:

> If its constitutionality was to be tested at this time the article would most probably be found to be violative of the right of citizens to equal protection under

> the law, as guaranteed by the 14th Amendment. *New York State Legislative Annual* 34 (1965).

The New York legislature itself knew; for in 1965 it finally abolished New York's blue ribbon jury system.

The exclusive nature of New York's blue ribbon jury system explains why blue ribbon juries convicted in a substantially greater percentage of cases than general juries. For example, a study for the defense in *Moore* v. *New York*, 333 U.S. 565, 567 (1948), showed that in the ten-year period from July 1, 1937 to June 30, 1946 special juries in Bronx County "convicted in 79% of the cases while the general juries convicted in 57%."

The Court in *Fay* v. *New York*, 332 U.S. 261 (1947), was sensitive to the problem:

> But a ratio of conviction so disparate, if it continued until 1945, might, in absence of explanation, be taken to indicate that the special jury was, in contrast to its alternate, organized to convict. A defendant could complain of this inequality even if it were shown that a special jury court never had convicted any defendant who did not deserve conviction.

332 U.S. at 286.

However, the Court was reluctant to throw the statute out because it felt that there was insufficient evidence to show intentional exclusion. But in *Whitus* v. *Georgia*, 385 U.S. 545 (1967), *Jones* v. *Georgia*, 389 U.S. 24 (1967), and *Sims* v. *Georgia*, 389 U.S. 404 (1967), the Court held that the defense did not have to show intentional exclusion. It was sufficient to show that a fair cross section was lacking.

The Mark Fein blue ribbon jury did not represent a fair cross-section.

In *Whitus,* the Court vacated the judgment of conviction when it was shown that Negroes constituted 27.1% of the tax rolls, but only 9.3% of the grand jury venire and 7.8% of the petit jury venire. The Court held that the State was required to explain this discrepancy. In *Jones,* the Court held that the burden was on the State to explain the disparity between the percentage of Negroes on the tax digest and those on the venires. The Supreme Court based its decision on the fact that the tax rolls showed 20% Negroes, and only 5% of the jury list was Negro. It did not require the defendant to show any intent to discriminate.

Reference may also be made to *Rabinowitz* v. *United States,* 366 F.2d 34 (5th Cir. 1966), where the Fifth Circuit reversed a conviction of a white defendant because the system of choosing jurors discriminated against Negroes, even though there may have been no intent to exclude. The court held:

> In defense of the jury commissioners, it is said that they did not specifically intend to exclude Negroes from federal juries. The jury commissioners must be held to have intended the natural result which flowed from their conduct.

366 F.2d at 56.

As a result of the 1952 study, the New York Judicial Council renewed its recommendation that special juries be abolished. The deeper constitutional doubts raised by the 1952 study and Report once again spurred the movement

for legislative reform (see, for example, the excerpt from the April 26, 1965 Report of the Committee on Criminal Courts, Association of the Bar of the City of New York, App. XII, pp. 106a-108a). Meanwhile, post-*Fay* decisions in numerous other states had begun to give wholehearted endorsement to the principle that juries in criminal trials must be drawn from a representative cross-section of the community. See, *e.g., People* v. *White,* 43 Cal. 2d 740, 752-753, 278 P.2d 9, 17 (1954), *cert. denied,* 350 U.S. 875 (1955); *Allen* v. *State,* 110 Ga. App. 56, 137 S.E. 2d 711 (1964); *State* v. *Ferraro,* 146 Conn. 59, 147 A. 2d 478 (1958), *cert. denied,* 369 U.S. 880 (1962), *State* v. *Dodge,* 12 Utah 2d 293, 365 P.2d 798 (1961); *Crawford* v. *State,* 408 P. 2d 1002 (Alaska, 1965); *State* v. *Madison,* 240 Md. 265, 272-273, 213 A.2d 880, 885 (1965); *State* v. *Jones,* 44 Del. 372, 57 A.2d 109 (Ct. Oyer & Terminer, 1947). In New York, legislative reform was finally accomplished by New York Laws 1965, c. 778, §3; but this was too late for the petitioner's trial.

The fact that New York has now abolished the blue ribbon jury system does not render the question presented by this petition any less substantial. The long-overdue legislative reform finally enacted in New York is of no avail to the petitioner, who has been sentenced to serve thirty years to life imprisonment after being tried under this unconstitutional jury statute. Moreover, a decision sustaining the petitioner's contention will give further notice to the comparatively small group of states which still authorize the use of special or struck juries in criminal cases that such fundamentally discriminatory and unfair methods of selecting juries can no longer be tolerated under the Constitution. There are some states which still have statutes authorizing the use of special or struck juries in certain

criminal cases. Alabama Code, Appendix (Vol. 14), §§713-719 (counties with population of 400,000 or more); Delaware Code Ann., Title 10, §§4541-4543; Indiana Stat. Ann., §§4-7108 to 4-7114 (Burns) (1968 Replacement); New Jersey Stat. Ann., §§2A:75-1 to 2A:75-5.

V

The trial judge's statements to the jury violated the petitioner's right to silence under the Fifth and Fourteenth Amendments.

It was in the Court's opinion in *Malloy* v. *Hogan*, 378 U.S. 1, 5, 10 (1964), that Mr. Justice Brennan was at long last able to say that the Fifth Amendment's privilege against self-incrimination was applicable to the states. In *Malloy* the privilege, or right of silence as it is more descriptively called, got the Court's usual broad application. It covered even answers which would furnish only a link in the chain of evidence. Moreover, it applied whenever a witness felt that his answer might tend to incriminate him, unless the judge could see with perfect clearness that the answer could not possibly have such a tendency. This left the witness pretty much in the driver's seat.

Malloy v. *Hogan* overruled not one but two earlier leading cases: *Adamson* v. *California*, 332 U.S. 46 (1947); as well as *Twining* v. *New Jersey*, 211 U.S. 78 (1908).

In the yet more recent case of *Griffin* v. *California*, 380 U.S. 609 (1965), the Court held that its ruling in *Malloy* that the Fifth Amendment privilege against self-incrimination was to be applied to the states in the same manner

as against the federal government, was to be taken literally: accordingly the federal rule against comment on a defendant's failure to take the stand governed in the states as well.

Thus *Bruno* v. *United States,* 308 U.S. 287, 294 (1939), becomes fully applicable to the states. There the Court held that "the accused should be allowed to make his own choice" as to whether the court should give any instruction on the right not to testify. If he wants such an instruction, he is entitled to it, but the trial judge may not call attention to the defendant's silence if the defendant has not requested such an instruction.

Reference may also be made to *Redfield* v. *United States,* 315 F.2d 76, 80 (9th Cir. 1963), where the court held that a defendant's right of silence may "be violated by an official statement in the presence of the jury that the defendant is entitled to testify". *Accord, McKnight* v. *United States,* 115 Fed. 972 (6th Cir. 1902).

Indeed, prior to the instant case, New York reviewing courts repeatedly reversed convictions because of the remarks of trial judges to juries elaborating on the constitutional or statutory language. *People* v. *McLucas,* 15 N.Y. 2d 167, 256 N.Y.S. 2d 799 (1965); *People* v. *Manning,* 278 N.Y. 40 (1938); *People* v. *Forte,* 277 N.Y. 440 (1938); *People* v. *Fitzgerald,* 156 N.Y. 253 (1898); *People* v. *Arthurs,* 3 A.D. 2d 966, 161 N.Y.S. 2d 971 (4th Dep't 1957). But none of these authorities, all of which were cited as well as quoted in the petitioner's brief in the New York Court of Appeals, did him any good.

VI

Prejudicial publicity, emanating from the police and the prosecution, violated the due process clause of the Fourteenth Amendment.

The New York Court of Appeals sought to dispose of petitioner's point under *Sheppard* v. *Maxwell,* 384 U.S. 333 (1966), about prejudicial publicity, on the grounds (1) that the publicity in question for the most part took place at the time of the arrest, nearly eight months prior to trial, (2) that four months prior to trial, defense counsel had argued that petitioner was ready to go to trial, and (3) that petitioner had not sought a change of venue (App. V, p. 43a). None of these grounds is adequate. Both separately and together, they show that the New York courts are unprepared to accept the minimum due process standards expressed in the federal Supreme Court's decisions. Thus, to say that most of the prejudicial publicity took place at the time of arrest (on February 21, 1964) is to ignore both the lurid June 1964 magazine articles, and the prejudicial publicity during the trial itself. To give weight to the fact that in June defense counsel had said petitioner was prepared to go to trial is to ignore the entire reason why this occurred—namely, that the petitioner had then been incarcerated without bail for over three months and petitioner's only alternative to a speedy trial appeared to be to remain in prison for an indefinite period of time until the prosecution was ready to proceed (47A-157A). Finally, the fact that a change of venue was not sought can hardly be held to be a waiver of petitioner's constitutional right to a fair trial. Waivers of basic con-

stitutional rights are not to be so easily implied. *Johnson* v. *Zerbst,* 304 U.S. 458, 464 (1938); *Brookhart* v. *Janis,* 384 U.S. 1, 4-8 (1966). While it may be one factor to consider in determining whether prejudice actually existed, petitioner's failure to make such a motion cannot be dispositive of the federal constitutional claim. *Stroble* v. *California,* 343 U.S. 181, 193-194 (1952). The ultimate test under the Constitution must be whether the trial was actually a fair one by due process standards. Thus in *Moore* v. *Dempsey,* 261 U.S. 86 (1923), no motion had been made for change of venue.

Moreover, the New York Court of Appeals wholly ignored the prejudicial publicity during the trial itself, when it was too late to change the venue. Even if the juror's word be accepted that although he saw the particular article but did not "read" it, his glancing at it would have been sufficient to convey its adverse tenor. Thus, the courts have given proper recognition to the fact that "the average juror" is often honestly unaware of "the unconscious influence of his preconceptions as to probable guilt", *Delaney* v. *United States,* 199 F. 2d 107, 112-113 (1st Cir. 1952), and that, even on the conscious level: "There is no certainty that all jurors would volunteer information about violating the admonitions or admit that they were influenced by the publicity." *United States* v. *Accardo,* 298 F. 2d 133, 136 (7th Cir. 1962), citing *Coppedge* v. *United States,* 272 F. 2d 504, 508 (D.C. Cir. 1959).

Conclusion

The suppression of evidence, the denial of pretrial discovery, the admission into evidence of illegally seized material, the use of a blue ribbon jury, the trial judge's statements to the jury which violated the petitioner's right of silence, and prejudicial publicity—these were the techniques by which the People unconstitutionally obtained a judgment of conviction against the petitioner. Such techniques all have become not only obsolete but also unconstitutional. The Court should grant the instant petition for a writ of certiorari; and hold that our country has a uniform system of criminal justice, applicable alike to defendants in state as well as federal criminal cases, and measured, with the exception of indictment by grand jury, by the relevant specifics of the federal Bill of Rights.

Respectfully submitted,

MILTON C. WEISMAN
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Attorneys for Petitioner

APPENDICES

APPENDIX I

Opinion of District Judge John R. Bartels

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 303—September Term, 1967.

(Argued February 9, 1968 Decided March 24, 1969.)

Docket No. 31921

UNITED STATES OF AMERICA, *ex rel.* MARK FEIN,
Petitioner-Appellant,

—v.—

JOHN T. DEEGAN, as Warden of Sing Sing Prison, State of New York,
Respondent-Appellee.

Before:

WATERMAN and FEINBERG, *Circuit Judges,*
and BARTELS, *District Judge.**

An appeal from an order of the United States District Court for the Southern District of New York, Palmieri, *J.*, denying appellant's motion for a writ of habeas corpus.
Affirmed.

O. JOHN ROGGE, MILTON C. WEISMAN, RICHARD SHEINBERG, ABRAHAM L. WAX, ARTHUR KELLER, Weisman, Celler, Allan, Spett & Sheinberg, New York City, *for Appellant.*

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* Of the Eastern District of New York, sitting by designation.

Appendix I

ERIC A. SEIFF, Spec. Counsel to the District Attorney, H. Richard Uviller, Asst. District Attorney, Frank S. Hogan, District Attorney, New York County, *for Appellee.*

BARTELS, *District Judge*:

Following his conviction for second degree murder in the State Supreme Court, Mark Fein, the appellant, moved for a new trial asserting a number of claims. Those raising the most serious questions are (i) the suppression by the prosecution of the name and story of Dagmar Finch Generazio; (ii) the admission into evidence, without a hearing, of a chair allegedly obtained by means of an illegal search and seizure; and (iii) the use of a Blue Ribbon Jury at appellant's trial.

After an extensive hearing[1] by the trial court (Culkin, *J.*), the motion was denied. The Appellate Division of the State Supreme Court (24 App. Div. 2d 32, 263 N.Y.S. 2d 629 (1st Dept. 1965)) unanimously affirmed both the judgment of conviction and the denial of the appellant's motion for a new trial and that decision in turn was affirmed by the Court of Appeals (Fuld, *J.*, dissenting), 18 N.Y. 2d 162, 272 N.Y.S. 2d 753 (1966). The appeal to the United States Supreme Court was dismissed for want of jurisdiction (Douglas, *J.*, dissenting) and the petition for a writ of certiorari denied. Then followed Fein's application for a writ of *habeas corpus* in the United States District Court for the Southern District of New York, which was denied

1. Gloria was not available for this hearing and there is no showing that she would be available for any other hearing.

by Judge Palmieri (*United States of America ex rel. Fein* v. *Deegan*, No. 67 Civ. 2514, S.D.N.Y. Oct. 13, 1967). In effect, we are reviewing a State court record which has been reviewed by 12 State court judges as affirmed by 11 of them.[2]

The story is a sordid one, resulting on October 10, 1963 in the murder of Rubin Markowitz, a one-time grocery clerk and bookmaker. Markowitz was last heard from by a client at 4 P.M. that same day and his death occurred after that hour.

Fein owed Markowitz $7,000, which he had lost betting against the Los Angeles Dodgers in the 1963 World Series. He made an appointment with Markowitz to pay the $7,000 and at the same time he made arrangements with a friend to pay Markowitz approximately $16,690 owed to Markowitz by that friend and another. For this purpose Fein was given $4,690 in cash and a $12,000 promissory note payable to Fein. The killing permitted Fein not only to write off his own debt but ultimately to pocket the $16,690 furnished by the friend.

The State's chief witness against Fein was Gloria Kendal, an admitted prostitute and the some time mistress of Fein. She testified that Fein telephoned her to come to his apartment (which he leased in the name of "Weissman" for his extramarital activities) between 5:30 and 5:45 P.M. on October 10, 1963. Before responding to this distress signal, Gloria left a message with another prostitute who remained in her apartment, one Sandra Ede. This message was addressed to Geraldine Boxer (Geri), whose custom

2. If we add the State trial judge and the Federal district judge, 13 judges have approved the record.

was to meet daily with Gloria for light supper before each attended their respective evening classes. Gloria then taxied the ten blocks to Fein's secret lodging. When she arrived before 6 P.M. at Fein's apartment "He was very flushed. His hair was messed, and his eyes were enormous." Fein then told her that he had shot his bookmaker Rudy and asked her to assist him in disposing of the body which he had stuffed into a steamer trunk. Gloria testified that she "saw part of an arm, and some new clothes line, and some white material that looked like a shirt." Responding to his request, Gloria called one David Broudy, an unemployed taxi cab driver (who did not know Fein), who immediately proceeded by car to the "Weissman" apartment. In the meantime Geri drove to Gloria's apartment and was directed by Sandra Ede over the intercom to proceed to the "Weissman" apartment pursuant to Gloria's instructions.

Both Broudy and Geri eventually arrived at the "Weissman" apartment. In answer to a question by Broudy, Fein stated that while he was paying his bookmaker "somebody burst in * * * shot this man and scooped up the money and left." He also told Broudy that he had lined the bottom of the trunk with "some canvas bags" to prevent blood leakage. Since the trunk would not fit into either Broudy's car or Geri's car, Fein arranged for the rental of a station wagon. After he and Gloria picked up the vehicle, Fein and Broudy loaded the trunk into it and Fein gave the keys to Broudy and departed for a dinner date with his wife and friends.

Thereafter the two women and Broudy drove the station wagon to Gloria's apartment and double parked while

Gloria entered the apartment, had a drink with Sandra Ede and obtained some money to pay Broudy for his trouble. Half an hour later she returned to the car where Broudy and Geri were waiting. Thereafter the three disposed of the trunk in the Harlem River. During the weeks that followed Gloria and Broudy, in answer to Fein's plea for help, attempted to obliterate all evidence that might have associated Fein or the crime with the "Weissman" apartment by filling and painting holes in the floor and wall, destroying the carpet and removing furniture and furnishings.

The Alleged Suppression of the Testimony of Dagmar Finch Generazio

One of the chief grounds for Fein's application for *habeas corpus* was the alleged suppression of the testimony of one Dagmar Finch Generazio (Dagmar), a prostitute associate of Gloria, which Fein claims to be exculpatory. There are two phases of Dagmar's testimony, the first relates to an alleged phone call from Gloria to Dagmar and the story Dagmar told the prosecutor pertaining to that call, and the second relates to Gloria's second recantation on September 28, 1964, three weeks before the trial. Dagmar's post-trial testimony was to the effect that Gloria had telephoned her on the day of the murder[3] before 4 P.M. at Gail Weiner Tracy's apartment on 64th Street, where she was living at the time. In this conversation Gloria tried to induce Dagmar to assist her in finding a car to move a heavy box but was unsuccessful. The defense claims that

3. As a matter of fact, the prosecutor and the detective testified that she said the phone call was made in late September or early October.

the testimony of this telephone call before 4 P.M. would have been not only damaging to Gloria's credibility but might have suggested that Gloria, rather than Fein, was responsible for the murder.

Dagmar's estranged husband corroborated his wife's account to the police by testifying at the hearing that his wife had said to the detectives that the call was "in the afternoon of October, this particular time * * * She did say it was in the afternoon." Gail Tracy testified that the phone call was made shortly after 3 P.M. But prior to this testimony at the hearing Gail testified that she had called Dagmar a liar when Dagmar stated that such a phone call had been made because, according to Gail, Dagmar had not been in Gail's house for six or seven months. She also admitted that, except on one post-trial occasion, she had flatly denied the occurrence of any such call and did so on one occasion in Dagmar's presence.

Both Assistant District Attorney Vincent Dermody and Detective Leman testified that Dagmar had never said that the telephone call was made earlier than between 6 and 7 o'clock. At one time she told Detective Leman that "maybe it was eight o'clock or nine o'clock." In an effort to fix the time more precisely she said "All I know is that it was dark out, and when I entered the building the dry cleaning man was getting ready to close his store." On a second visit to the District Attorney's office, Dagmar related in front of Gail Tracy the story of receiving a phone call at her house some time after or between 6 and 7 P.M. Gail Tracy called Dagmar a liar stating that Dagmar never received a call on Gail's telephone at any time.

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In his decision on the post-trial motion, the state trial judge rejected Dagmar's testimony as well as that of her husband and of Gail Tracy as being unworthy of belief, and denied the motion for a new trial. As to Dagmar, the judge specifically found as follows:

> "Having seen and heard this witness, I reject her testimony as totally unworthy of belief. While under oath at the hearing, she strained with tireless effort to avoid telling the truth, whether the examination covered her recorded criminal past, the date of her marriage, the frequency which the police telephoned her, or the reaction of Gail Weiner Tracy, a witness called by the prosecution after she submitted a sworn question and answer on belaf of the defendant, upon a certain confrontation. The foregoing are all measurable standards, but of no greater import than the impression this witness created when set against less tangible marks. I find that she never told the prosecution of receiving a call *on any afternoon.* I further find that insofar as this witness' credibility is concerned, her story that she received any call from Mrs. Lazarus on the day, or month, of the killing does not warrant belief." (Emphasis added.)

The state judge, after hearing all the witnesses, thus found that Dagmar never told the prosecutor of a call received between 3 and 4 P.M.

In *United States* v. *Johnson,* 327 U. S. 106 (1946), the Supreme Court held that it was not the province of a federal court of appeals in reviewing orders granting or denying motions for a new trial, to intervene on the ground of erroneous findings of fact unless it clearly appears that

such findings are unsupported by any evidence. As the court observed (p. 113):

> "While a defendant should be afforded the full benefit of this type of rectifying motion, courts should be on the alert to see that the privilege of its use is not abused. One of the most effective methods of preventing this abuse is for appellate courts to refrain from reviewing findings of fact which have evidence to support them. The circuit court of appeals was right in the first instance, when it declared that it did not sit to try de novo motions for a new trial."

Where the State court has made a full and fair evidentiary hearing with express findings of fact, the district court may "and ordinarily should, accept the facts as found in the hearing" (*Townsend* v. *Sain,* 372 U. S. 293, 318 (1963); see, *Midgett* v. *Warden, Maryland State Penitentiary,* 329 F. 2d 185 (4th Cir. 1964); *Durham* v. *Haynes,* 258 F. Supp. 452 (E. D. Mo., N. D. 1966), *aff'd,* 368 F. 2d 989 (8th Cir. 1966), *cert denied,* 390 U. S. 959 (1968)). This principle was codified in 28 U. S. C. A. §2254(d), which provides that the determination of fact of the State court in a *habeas corpus* proceeding, subject to certain other provisos not here present, "shall be presumed to be correct," unless the "factual determination is not fairly supported by the record." Since we do not believe that it can be said that the findings of the State court are not fairly supported by the record and since that hearing was full and fair, we must, therefore, accept at least the finding that Dagmar "never told the prosecution of receiving a call on any afternoon." The State also argues with force that since the State judge

also found incredible Dagmar's story that she received *any* call from Gloria on the day of the killing, that should end this phase of the appeal. However, Fein points out that the prosecutor conceded that Dagmar made a statement to him of a 6 to 7 P.M. telephone call, which is not in the "afteronon." While this is not a concession that Dagmar actually did receive a call, it does bear on the prosecutor's state of mind and his alleged "unfairness."

We turn then to the assumption that Dagmar did tell the prosecutor of a 6 to 7 P.M. telephone call. It is argued that such information was vitally material to the defense because from such a call the jury could draw an inference damaging to Gloria. The prosecution witnesses testified that when Broudy, Geri and Gloria drove the station wagon containing the trunk from the "Weissman" apartment, they stopped at Gloria's apartment between 6 and 7 P.M. Fein suggests that had the prosecutor disclosed that he had evidence indicating that Gloria had, at the time she went upstairs to her own apartment, telephoned Dagmar in an attempt to borrow a car to remove a box, the jury might have inferred that the decedent's body was not in the trunk at all but was elsewhere awaiting removal; thus the entire substance of Gloria's story that it was at Fein's request that she had become involved in disposing of the body of the man murdered in the "Weissman" apartment was false. A major difficulty with this theory is that there is no evidence from any witness that Markowitz's body was anywhere except in the station wagon trunk at the time. Broudy testified that Fein said that the body was in the trunk, Gloria testified that she had seen the body in the

trunk, and Broudy and Gloria testified that they helped Fein to remove the damaging evidence from the "Weissman" apartment. Moreover, it was reasonable for the prosecution to conclude that there was no major inconsistency between Gloria's account and Dagmar's statement that Gloria made a phone call to Dagmar between 6 and 7 P.M., because the call could have been made by Gloria from the "Weissman" apartment (rather than from Gloria's apartment) at the same time Gloria called Broudy (which was around 6 P.M.) in her effort to get a car to remove the trunk. From the record it appears that the prosecutor had reason to feel unsure as to whether Dagmar was telling the truth. Dagmar had mentioned that she received a call from Gloria while at Gail Tracy's apartment, but Mrs. Tracy had denied this to the prosecution before the trial. It is true that Dagmar's statement might have been used to attack Gloria's credibility but, as indicated below, defense counsel was adequately armed at trial and attacked her credibility thoroughly. Under all the circumstances, even giving credence to Dagmar's statement that she had informed the prosecution about a phone call between 6 and 7 P.M. does not vest it with the materiality essential to a finding of prosecutorial suppression.

The second phase of Dagmar's potential testimony, allegedly suppressed, involved Gloria's second recantation on September 28th. Dagmar testified that Gloria had twice asked her to "stick with me." Finally there was a confrontation between Dagmar and Gloria at the District Attorney's office when Dagmar related the story that Gloria had called Dagmar at Gail's apartment between 6 and 7

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P.M. Gloria denied the call and began screaming and yelling that Detective Leman was trying to induce people to lie about her. Detective Leman escorted Dagmar from the room and Gloria demanded to see her lawyer. After Dagmar and Leman left, Gloria recanted her story for the second time, only to return to the original story given at the trial. The prosecutor advised defense counsel of both recantations but not of the confrontation with Dagmar prior to the recantation. In their testimony neither Gloria nor Detective Leman mentioned Dagmar's presence at the meeting prior to the recantation. Based upon these circumstances, the defense has accused the prosecution of countenancing false testimony.

Gloria and Detective Leman had conflicting explanations at the trial of the case as to the cause of the second recantation. In each case their testimony was predicated upon their respective opinions as to the cause. It cannot be said whether either was right or wrong. In all events, Dagmar was not present at the time of the recantation although she was present at the meeting. The questions posed by the defense itself were ambiguous. The Appellate Division held that who was present at the interview was not emphasized and the question did not clearly indicate that presence at the interview rather than presence at the time of recantation, was the information sought. The Court of Appeals held that the record amply sustained the lower court's finding that the testimony was not in fact false or perjurious. We are compelled to agree. The record discloses that materiality of Dagmar's confrontation under the

circumstances is highly speculative and fails to reveal any evidence of its suppression.

Dagmar's testimony did not bear directly upon the guilt or punishment of Fein. At most, it pertained to Gloria's credibility, provided one could bridge the gap of Dagmar's incredibility. Gloria's credibility, however, had been relentlessly attacked by an exhausting and punishing cross-examination in which her recantations and background were thoroughly explored. Even the prosecutor in his summation described her, among other things, as "notorious," "a moral leper," and "an old whore." Nevertheless, the jury believed enough of Gloria's testimony, as corroborated by Broudy and Geri, to convict Fein.

Fein claims that he made a request to the prosecutor for Dagmar's whereabouts, which poses the question of prosecutorial suppression. It is admitted that during the course of the trial the defense was aware that Dagmar had told the prosecutor that she had received a phone call from Gloria on the murder day in an attempt to borrow a car. In fact, the defense counsel knew about Dagmar, as appears from his cross-examination of Geri Boxer, when he inquired as to Geri's acquaintanceship with Dagmar. In a hallway conversation during the trial, William J. Whelan, defendant's investigator and a former policeman, informed Detective Leman that the defendant knew of the phone call and asked whether the prosecutor was going to place Dagmar on the stand, to which Detective Leman replied that he did not know. When Detective Leman asked Whelan if the latter had called Dagmar's mother in Baltimore, Whelan requested the mother's phone number,

to which Detective Leman replied "I am not at liberty to give it to you." Whelan stated that he "did not expect that he would give it to me." In other words, Whelan as a former policeman knew that the request was not made to the proper source and that a detective ordinarily is not at liberty to furnish information to the defense without the authority of the prosecutor. Yet the defense neither pursued the matter nor made an application to the court for Dagmar's whereabouts. Mr. Blinder, one of the defendant's counsel, stated at the post-trial hearing that he did not pursue the matter because he believed that if Dagmar were important to the defendant's case, the prosecutor would inform him of that relevance.

The Court of Appeals found that there was not only no request for Dagmar's full name, address or telephone number but also no indication that the defense could not locate her. If the request was to flag the importance of the evidence for the defense and accordingly impose upon the prosecutor a duty to make a careful check of his files, it was not too much to require that such request be made to someone in authority rather than to a police detective whom the defendant's own investigator did not believe would supply the information.

In *United States* v. *Keogh*, 391 F. 2d 138 (2d Cir. 1968), Judge Friendly classified the law as to prosecutorial suppression of evidence into three categories: (1) deliberate bad faith suppression for the very purpose of obstructing the defense, or the intentional failure to disclose evidence whose high probative value to the defense could not have escaped the prosecutor's attention; (2) deliberate refusal to honor a request for evidence where the evidence is ma-

terial to guilt or punishment, irrespective of the prosecutor's good faith or bad faith in refusing the request; and (3) where suppression was not deliberate and no request for evidence was made, but where hindsight discloses that it was so material that the defense could have put the evidence to not insignificant use (pp. 146-148). The best that can be said for appellant's point is that the action of the prosecutor in this case arguably fell within the second category of a deliberate refusal to honor a request for evidence that is material to guilt or punishment. But in our view, it would be unfair and inequitable to charge the prosecutor with the responsibility for any oral request which was made by an employee of the defendant, such as an investigator, to an employee of the prosecutor, such as a detective. Aside from that failure, we find it hard to evaluate Dagmar's testimony as material. The third category set forth in *Keogh* refers to an unintentional suppression of evidence without a request where the evidence was so material that "the defense could have put the evidence to not insignificant use." But in those cases "the standard of materiality must be considerably higher." As Judge Friendly remarked (p. 148): "To invalidate convictions in such cases because a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict would create unbearable burdens and uncertainties." Dagmar's testimony was peripheral in nature and only obliquely affected Gloria's credibility. To say the least, it is doubtful whether such evidence satisfied the standard of materiality required by the second category. Certainly it did not satisfy the standard of materiality in the third category. It seems to us

that no stretching can force the testimony of Dagmar into the factual pattern of prosecutorial suppression of material evidence, condemned in *Brady* v. *Maryland*, 373 U.S. 83 (1963); *Giles* v. *Maryland*, 386 U.S. 66 (1967); *Barbee* v. *Warden, Maryland Penitentiary*, 331 F. 2d 842 (4th Cir. 1964).

It is appropriate to note that upon an application for a new trial based upon newly discovered evidence, due diligence is an essential factor. See, New York Code of Criminal Procedure, §465(7) and cases cited thereunder; see also, *United States* v. *Costello*, 255 F. 2d 876 (2d Cir. 1958), *cert. denied*, 357 U.S. 937 (1958), *reh. denied*, 358 U.S. 858 (1958); *Kyle* v. *United States*, 297 F. 2d 507 (2d Cir. 1961), *cert. denied*, 377 U.S. 909 (1964); *United States* v. *Capece*, 287 F. 2d 537 (2d Cir. 1961), *cert. denied*, 368 U.S. 847 (1961); *United States* v. *Lombardozzi*, 343 F. 2d 127 (2d Cir. 1965), *cert. denied*, 381 U.S. 938 (1965). And such application will not be granted if the evidence is merely impeaching. *People* v. *Eng Hing and Lee Dock*, 212 N.Y. 373, 386, 106 N. E. 96 (1914); *Mesarosh* v. *United States*, 352 U.S. 1 (1956); *United States* v. *Aguillar*, 387 F. 2d 625 (2d Cir. 1967). To relieve the defendant of his duty of due diligence, the evidence of prosecutorial suppression should be clear and unequivocal. A half-hearted and casual inquiry made by one subordinate to another subordinate should not shift the responsibility to the prosecutor. The prosecutor made many disclosures to the defense and there is nothing in the record which suggests that his conduct, as well as that of his staff, under difficult circumstances did not amply satisfy the fundamental concepts of due process necessary in order to provide the defendant with a fair trial.

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The Admission into Evidence of the Chair

The second relevant ground for Fein's complaint is the admission into evidence of a chair containing a speck of blood, allegedly seized in violation of the Fourth and Fourteenth Amendments. When the prosecutor offered the chair for identification, the defense counsel objected at the bench in these words:

> "If this furniture purports to be furniture that was in the apartment, Apartment 5-B, which is the apartment in question over here; and if that apartment was entered into without a search warrant; or in the alternative, since we have already heard some furniture had been stored in some furniture storage warehouse, if this furniture had been secured from this furniture storage warehouse without the proper legal warrant or proper legal authorization, I object to it; and I shall move to suppress this evidence."

The chair was marked for identification upon the condition that the defense was not deemed to have waived its right to question the legality of the evidence on a motion to suppress later. Eight days later, during direct examination, Gloria testified that Fein had requested her to remove all the furniture, including the chair, from the 63rd Street apartment, saying: "Get rid of all the furniture in the apartment now, and get rid of the rug; get rid of everything." Gloria placed the chair in a storage warehouse under a pseudonym. The chair was received in evidence over the general objection by the defense, counsel reminding the court of a discussion about the chair at the bench a few weeks prior thereto. The trial court stated: "Yes, I am familiar with that; but under the testimony here, the objection is overruled."

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At the post-trial hearing the State court stated that there was no evidence to support the counsel's objection that the chair was illegally seized. It added that after the witnesses for the prosecution testified, the defense did not seek a *voir dire* upon the ground of illegal search and seizure and it accordingly found that the chair had been abandoned by the defendant. The Appellate Division stated that the speck of blood on the chair was so small that it could not be typed and that the chair could be disregarded as proof that the homicide took place in the apartment. The Court of Appeals found that the defendant abandoned his interest and retained no rights in the chair which could be breached by an illegal seizure. The District Court found that the police had procured the chair stored in a warehouse in the name of "Weissman" without a search warrant, but that Fein had given Gloria authority to dispose of the chair and had abandoned it just as if he had thrown it in a public wastepaper basket.

Defendant claims that he was deprived of his fundamental constitutional rights under the authority of *Jackson* v. *Denno,* 378 U.S. 368 (1964), because he was denied a hearing under the New York Code of Criminal Procedure §813-c in the absence of the jury upon the issue of abandonment. The particular facts in this case do not pose the attack upon the rights of the accused presented in *Jackson* v. *Denno, supra.* Assuming that Fein had properly preserved his right under §813-c of the New York Code of Criminal Procedure, the court was justified in proceeding without such a hearing. Defense counsel's objection was based upon an "if" but that "if" was rendered meaningless by Gloria's subsequent testimony.

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While the right to a suppression hearing is not a technical device or a narrow procedural requirement, nevertheless it is a right that must be asserted upon unambiguous grounds. Although the chair was taken by a warrantless search from the warehouse, counsel for Fein knew, after eight days of testimony, that if Fein had any right to a separate suppression hearing, it would have to be asserted upon the ground that Fein had a property interest in the chair. Counsel was an experienced and skillful defense attorney and he knew how to focus attention upon his client's rights. Instead of making a claim of property interest in the chair to the court (which he could have asserted outside of the hearing of the jury), he was content to rely upon his earlier objection of an illegal search and seizure predicated upon the hypothesis that the chair was in the "Weissman" apartment at the time of the search which he knew at the time of the second objection was not the fact. It was then his duty to come forward with an assertion of some specifics to show that he had a standing to demand a §813-c hearing. This he did not do. Under such circumstances, he cannot wait until after the trial and then claim that he was deprived of his rights. *Cohen* v. *United States,* 378 F. 2d 751 (9th Cir. 1967), *cert. denied,* 389 U.S. 897 (1967); *United States* v. *Phillips,* 375 F. 2d 75 (7th Cir. 1967), *cert. denied,* 389 U.S. 834 (1967); *People* v. *Solimine,* 18 N.Y. 2d 477, 223 N.E. 2d 341, 276 N.Y.S. 2d 882 (1966); *People* v. *Estrada,* 28 A. D. 2d 681, 280 N.Y.S. 2d 825 (2d Dept. 1967); *People* v. *DeVivo,* 23 A. D. 2d 793, 258 N.Y.S. 2d 1013 (1st Dept. 1965); *People* v. *Childers,* 54 Misc. 2d 752, 283 N.Y.S. 2d 336 (Sup. Ct. 1967). Fein will not be heard to claim prejudice from the use of evidence arising from a search

and seizure in violation of the constitutional right of either Gloria or the warehouseman. *Jones* v. *United States*, 362 U.S. 257 (1960); *Abel* v. *United States*, 362 U.S. 217 (1960), *reh. denied*, 362 U.S. 984 (1960); *Hester* v. *United States*, 265 U.S. 57 (1924); *United States* v. *Masterson*, 383 F. 2d 610 (2d Cir. 1967), *cert. denied*, 390 U.S. 954 (1968), *reh. denied*, 391 U.S. 909 (1968). One is compelled to infer that Fein's counsel failed to properly move at the trial not only because the evidence indicated that the chair had been abandoned and the result of his application would have been fruitless, but also because Gloria's damaging testimony with respect to the chair was at all events admissible, even though the chair might have been inadmissible.

The Challenges to the Blue Ribbon Jury

The final serious question presented by this appeal involves a double-barreled attack on the special jury convened by the trial court under the New York blue ribbon jury statute, former New York Judiciary Law §749-aa, repealed 1965 New York Laws ch. 778, §3. First Fein urges that New York's blue ribbon jury statute was unconstitutional because it resulted in a significant overrepresentation of persons from higher income groups with a corresponding underrepresentation of those from lower income groups. The argument that Fein was thus convicted by an unrepresentative jury presents difficult issues. The analogy is drawn to *Whitus* v. *Georgia*, 385 U.S. 545 (1967), and *Jones* v. *Georgia*, 389 U.S. 24 (1967), where a demonstration that members of a racial group were significantly underrepresented on grand and petit juries was enough to

make out a prima facie case of intentional discrimination and a denial of due process and of the equal protection of the laws. Those cases may be distinguishable but, in any event, it is more significant that what we are in effect being asked to do here is to overrule the decisions of the Supreme Court, sustaining by 5-4 vote the blue ribbon jury against constitutional attack, in *Moore* v. *New York,* 333 U.S. 565 (1948), and *Fay* v. *New York,* 332 U.S. 261 (1947), although that Court has not done so yet,[4] and even though the New York blue ribbon jury statute is no longer in effect. It is urged that those decisions would have been different had the Court then considered that the Sixth Amendment applied to the State; however, we believe that we are bound by these decisions until such time as the Court informs us that we are not.

In his reply brief, Fein for the first time also argues that the blue ribbon jury statute was unconstitutional on its face because its object was

> ". . . to effect the exclusion . . . of all those individuals who had conscientious scruples against capital punishment . . . Thus this statute assured the state of a jury whose members were partial to the prosecutor on the issue of guilt or innocence."

This argument in Fein's reply brief came after (and no doubt in light of) the grant of certiorari by the Supreme Court in *Witherspoon* v. *Illinois,* 391 U.S. 510 (1968). In that case the Court held unconstitutional the imposition of the death penalty in cases where persons with scruples against capital punishment were excluded from jury serv-

4. In our own court, we would be overruling *Vanderwyde* v. *Denno,* 113 F. Supp. 918 (S. D. N. Y. 1953), *aff'd per curiam,* 210 F. 2d 105 (2d Cir.), *cert. denied,* 347 U. S. 949 (1954).

ice, a holding explicitly limited to death penalty cases and then only to sentence rather than conviction. *Id.* at 522-23 n. 21; see *Bumper* v. *North Carolina*, 391 U.S. 543, 545 (1968). The Court in *Witherspoon* did consider the argument that exclusion of jurors with scruples against capital punishment precludes an impartial trial on the issue of guilt. The majority there said, *id.* at 517-18:

> "We simply cannot conclude, either on the basis of the record now before us or as a matter of judicial notice, that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction."[5]

While it is true that *Witherspoon* does hint, as the dissenters note, *id.* at 539, that the law may change on a different record, the studies and reports cited to us are the same as those cited to the Court in *Witherspoon* and *Bumper*. Thus, a different result could not be supported on the present law. However, we do not even reach the question. As pointed out above, this part of the challenge to the blue ribbon jury statute was first made in this court. Consequently, there was not only no opportunity for the district court to evaluate the question, but Fein apparently has not exhausted his State court remedies by first making the argument raised here to the New York State courts. In these circumstances, we should refuse to pass on the

5. Subsequently, the Court in *Bounds* v. *Crawford*, 37 U. S. L. W. 3150 (U. S. Oct. 21, 1968), vacated the judgment in *Crawford* v. *Bounds*, 395 F. 2d 297 (4th Cir. 1968) (*in banc*), which had accepted the argument urged to us, and remanded for reconsideration in light of *Witherspoon*.

claim without prejudice to Fein's subsequently making it to the State courts.

Appellant also claims that he is entitled to reversal because of other alleged prosecutorial suppression of evidence, denial of pretrial discovery and inspection, the effect of publicity, and certain statements made by the trial judge to the jury. These contentions were discussed and found to be without merit by Judge Palmieri in his opinion predicated upon the petition for the writ and the motion for a certificate of probable cause. We subscribe to his conclusions.

Upon the examination of the State court record, we find no violation of Fein's right to due process and a fair trial. Accordingly, we affirm the District Court's denial of the writ.

Judgment affirmed.

APPENDIX II

Concurring Opinion of Circuit Judge Waterman

WATERMAN, *Circuit Judge* (concurring):

I find the dissenting opinion of Chief Judge Fuld of the New York Court of Appeals, 18 N. Y. 2d 162, 177, 272 N. Y. S. 2d 753, 763 (1966), most persuasive. I, with him, believe that it is possible that the jury might have reached a different verdict if the testimony Dagmar Generazio gave at the post-trial hearing had been presented at the trial. Nevertheless, I recognize that petitioner was convicted in the New York state courts and not as a result of a federal prosecution, and as we are not therefore writing upon a clean slate I am willing to concur in the affirmance of the decision below.

It appears that before the state felony trial the defense knew of Dagmar's existence and of the possible importance of her testimony. The defense, despite this knowledge, did not exert itself to seek her out and interview her. This failure on its part to exercise a reasonable diligence in trial preparation should bar us in this collateral proceeding from ordering petitioner's release or ordering the grant of a new trial based upon truly newly discovered suppressed exculpatory evidence.

Even though the office of the prosecutor was in constant touch with Dagmar during crucial days of investigation and trial as shown by the records of the telephone company, I would not go so far as to hold that this interrogative surveillance requires us to overturn this state court conviction upon a consideration of likely inferences that may be drawn

from Dagmar's post-trial testimony. I agree with my brothers that we should not hold that there was a New York state prosecutorial suppression here; the defense was not unaware of Dagmar; she was not deliberately made unavailable to the defense; and no specific request was made by defense counsel for a direct lead to her whereabouts.

APPENDIX III

Opinion and Order of United States District Judge Edmund L. Palmieri, October 13, 1967

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

67 Civ. 2514

UNITED STATES OF AMERICA ex rel. MARK FEIN,

Relator,

against

JOHN T. DEEGAN, AS WARDEN OF SING SING PRISON, STATE OF NEW YORK,

Respondent.

Appearances

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Appendix III

PALMIERI, J.

This is a petition for a writ of habeas corpus by a state prisoner who was convicted on November 25, 1964, of murder in the second degree in the death of Rubin Markowitz and sentenced on May 26, 1965, to a prison term of thiry years to life. All remedies at the State level have been exhausted by petitioner. The trial court held a hearing of 16 days duration on a motion for a new trial which resulted in a denial of relief. (See opinion of Culkin, J., Record at pp. 3894-3913.)[1] In addition, the appellate courts of the State of New York have closely scrutinized the case. 24 App. Div. 2d 32 (1st Dep't 1965), 18 N.Y. 2d 162 (1966). Petitioner's application for a writ of certiorari was denied by the Supreme Court, 386 U.S. 978 (1967).

The petition alleges that the petitioner was denied the due process of law because: (1) the prosecution suppressed evidence favorable to the defense and knowingly used testimony that was false, incomplete, misleading and inaccurate; (2) publicity surrounding this indictment and trial resulted in an unfair trial; (3) evidence procured by an unlawful search and seizure was used against him over objection and without a hearing on its admissibility; (4) the court denied a pretrial motion for examination of the bullets found in the deceased's body and (5) a special (Blue Ribbon) jury under former Section 749aa of the Judiciary Law of New York was used to try his case.

The body of Rubin Markowitz was found floating in the Harlem River in the early morning of November 8,

1. References to the record are to the record on appeal to the Appellate Division, First Department, and the pagination is that on the bottom of the pages.

1963. Markowitz had last been seen by his family on the morning of October 10, 1963, and by associates at 4:00 p.m. the same day. Markowitz was a part-time grocery clerk whose main activity however, was illegal and covert—that of booking bets. His customers were assigned fictitious names which, along with telephone numbers, were used in the placing of bets. On such name was "Shore", the related telephone number being that of Carmela Lazarus, an admitted prostitute and mistress of the petitioner[2] (hereinafter called Gloria Kendall [Gloria], the alias by which she was known during the period relevant to this case). It was through Gloria that the police learned of the petitioner's existence.

The State's case was essentially this. Gloria testified that the defendant telephoned her on October 10, 1963, at about 5:30 o'clock in the evening, urgently requesting her to come to his "bachelor" apartment at 406 East 63rd Street, New York City. She reluctantly complied and when she arrived he told her he had killed his bookie[3] and exhibited the body in a trunk. At his behest she procured two of her friends, a Mr. Broudy and a Miss Boxer, to help dispose of the trunk. Petitioner arranged for the rental of a station wagon automobile, but stayed behind as Gloria and her two friends disposed of the trunk by dropping it into the Harlem River. Miss Boxer and Mr. Broudy testified to their part in the disposal of the body.

The various contentions made by petitioner before this Court will now be discussed seriatim.

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2. Pp. 1113-1118.

3. Petitioner owed the deceased $7,000 as a result of his losing bet on the Los Angeles Dodgers in the 1963 World Series (p. 563).

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Suppression of Evidence

Petitioner alleges that the prosecution concealed exculpatory testimony in three instances.

The first concerns Miss Sandra Ede (hereinafter Sandra), a friend of Gloria who spent a good deal of time at her apartment. Gloria testified that Sandra was at her apartment when petitioner called. As she was expecting Miss Boxer at the time she left a message for her with Sandra to go to petitioner's 63rd Street apartment. Miss Boxer testified that when she arrived at Gloria's apartment house she called on the intercom and Sandra gave her the message.

At the post-trial hearing it was established that the district attorney interviewed Sandra and she refused to testify. She stated that if called she would testify that she was not in the apartment at the time and consequently never received the message; that she had never spoken to Miss Boxer on the intercom; and that on the afternoon in question she was in her own apartment to see to the installation of a telephone. The defense was furnished with her name and address but it is claimed that the full extent of her interview was not revealed. It appears from the cross-examination of Miss Boxer, however, that the defense was, in fact, aware of Sandra's potential testimony (pp. 780-86).

The second instance concerns information of Mrs. Bennett and her mother, Mrs. McNair, two tenants of the apartment building in which the murder occurred. They occupied an apartment in the rear of the building whereas the petitioner's was in the front. They told the police

that they heard shots which they believed emanated from below their windows in the rear of the building. The defense interviewed these women several times prior to the trial but it claims they never revealed this information. It also appears that one of defense counsel dated Mrs. Bennett during this period.

The third concerns Mrs. Dagmar Generazio (hereinafter Dagmar), a prostitute associate of Gloria.[4] She told the prosecution that on the day of the murder she had received a telephone call from Gloria during which she asked for assistance in finding a car to move a heavy trunk. Dagmar placed this call at various times from 3:00 to about 7:00 o'clock in the evening. She testified at the post-trial hearing that she received it at 4:00 o'clock in the afternoon. Gloria never testified to making this call. The defense contends that such testimony would have had a damaging effect on Gloria's credibility, perhaps giving rise to an inference that she was involved in the crime before the victim's death as well as after it.

There also was testimony by Dagmar, at the post-trial hearing, to the effect that twice Gloria had asked her to "stick with her" (p. 2588). Finally there was a confrontation between the two women at the district attorney's office during which Gloria yelled at Dagmar and called her a "goddam liar" (p. 3362). The same day—the record does not make clear precisely how long it was after Dagmar left—Gloria recanted her story, only to recant again two days later to return to her original story—the one given at the trial and summarized above. The

4. Pp. 345-347.

prosecutor told defense counsel of both recantations[5] but not of the confrontation with Dagmar.

The defense was aware of the existence of Dagmar, although it knew her by her maiden name Dagmar Finch and did not know she had moved from New York to New Jersey. During the trial one of defense counsel's investigators asked one of the detectives assigned to the case for her address. He replied that he was not at liberty to disclose it. The defense did not pursue the matter further. No request was made of the district attorney nor was any motion addressed to the court. The investigator had told counsel that there was a witness who claimed she had received a call from Gloria to borrow a car (p. 3004), and before the trial was over counsel learned her name was Dagmar Finch. It is apparent that the defense made no effort to pursue the possible use of Dagmar as a witness at the trial.

The question posed by the petitioner before this Court is substantially the following: whether the prosecution violated petitioner's right to a fair trial under the due process clause of the Fourteenth Amendment and contravened the rule of *Brady* v. *Maryland*, 373 U.S. 83 (1963) by failing to turn over to the defense an account of the three episodes above discussed.

The instances petitioner cites do not amount to a violation of his rights by the prosecutor. Certainly no mis-

5. At the close of Gloria's direct testimony the prosecutor called defense counsel to the bench and there made a statement for the record that twice in the course of his investigation Gloria recanted her testimony about hearing the petitioner admit the shooting and seeing the body in the trunk. The first recantation does not concern us as no question was raised with respect to it in these proceedings.

conduct can be found in the handling of the bullets or the Bennett-McNair information as the defense had access to both. The prosecution's behavior in respect of Dagmar is similarly free from constitutional infirmity. The defense knew of her existence and of her possible usefulness as a witness. Yet no attempt, beyond that of the defense investigator, was made to get her name and address from the prosecution.

The doctrine of *Brady v. Maryland, supra,* does not require the disclosure of such testimony. The *Brady* rule is that

> the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. 373 U.S. 83, at 87.

There is no requirement that the prosecution be the guardian of every possible avenue of investigation available to the defense. Even assuming that a defense request is not always necessary, not every lead or story need be turned over. In *Brady,* the concealed evidence was an extra-judicial statement by the accused's companion, in which he admitted that he had committed the murder for which they were both being tried. This evidence was clearly material to the sentence as the jury was empowered to restrict the punishment to life in prison.[6] In his summation Brady's counsel's sole request was for just such a limitation.

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6. Also, under the Maryland State Constitution Art. XV, §5, the jury in a criminal case are "The Judges of Law, as well as of fact."

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In *Barbee* v. *Warden, Maryland Penitentiary,* 331 F.2d 842 (4th Cir. 1964), the suppressed evidence was a ballistics report and fingerprint tests which indicated that the accused's gun, which was marked for identification and waived before the jury although it was not admitted into evidence, was not the murder weapon. In *Application of Kapatos,* 208 F. Supp. 883 (S.D.N.Y. 1962), quoted with approval in *United States ex rel. Meers* v. *Wilkins,* 326 F.2d 135, 139-40 (2d Cir. 1964), this court found a violation when the prosecution suppressed the testimony of a witness who saw two persons, neither of whom was the accused, escaping from the scene of the crime immediately after he had heard shots. In each of these cases the court found that the concept of due process and fair play had been contravened.

The testimony of Dagmar is not of the same order. Firstly, it relates to the case in only an oblique way, going to Gloria's credibility. Gloria was subjected at the trial to the most exhaustive and punishing cross-examination in which her recantations and her sordid background were thoroughly explored. It does not bear directly upon the guilt or punishment of the petitioner. It does not exculpate the accused as did the evidence in the cases just discussed. Secondly, the district attorney's office felt unsure as to whether Dagmar was telling them the truth (p. 3462). The trial court, in fact, after hearing her testify at the post-trial hearing found her "totally unworthy of belief" (p. 3907). In addition, the police had interviewed a Gail Weiner Tracy. Dagmar said that she received the call from Gloria while at Mrs. Tracy's apartment. Mrs. Tracy denied this when she talked to the prosecution before trial (pp. 1239-

41). However, at the post-trial hearing she testified that she did, in fact, remember Dagmar's receiving the call (p. 1242). The trial court found her unworthy of belief (pp. 3912-13).

I find nothing improper in the prosecution's actions. Due process of law does not require the prosecutor to hold himself accountable to the defense on peripheral matters which he has good cause to believe are untrue, merely because they could conceivably be of some help to the defense. This is particularly applicable in this case where the burdens of the prosecution were heavy, and the myriad aspects of the circumstantial evidence of the crime presented almost infinite possibilities of factual conflicts. Moreover the prosecution would have been justified in rejecting the story as useless since the story Dagmar told until the post-trial hearing was that the call came after 6:00 o'clock. This presented no inconsistency with the prosecution's case.

PUBLICITY

Petitioner alleges that he was denied a fair trial because of publicity surrounding his arrest and trial. The publicity complained of, however, is not of the same order as that in *Sheppard* v. *Maxwell*, 384 U.S. 333 (1965), *Estes* v. *Texas*, 381 U.S. 532 (1964), and *Irvin* v. *Dowd*, 366 U.S. 717 (1960). It consisted of several newspaper stories at the time of petitioner's arrest, eight months before his trial, two articles in detective magazines in June, four months before trial, and a column in the New York Herald Tribune during the trial.

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There was no sustained level of publicity here as there was in the above-cited cases, the bulk of the publicity complained of having taken place fully eight months before petitioner stod trial. See *United States* v. *Miller*, F.2d (2d Cir. 1967). Counsel for petitioner, in effect, conceded this at the hearing on this petition.[7] Defense counsel, who was well aware of the publicity, was able to say, during a hearing on June 12, 1964, after petitioner by a habeas corpus petition moved for an immediate trial, "time has passed since then [the time of the bulk of the publicity]. We are willing to go to trial now."[8] Further, petitioner never moved for a change of venue.[9]

Petitioner was accorded a fair trial. Unlike the *Sheppard* case, the trial judge exercised appropriate control of the courtroom and of the jury. He repeatedly admonished the jury to avoid contact with any publicity concerning the case. When defense counsel brought the Herald Tribune column to his attention during the trial he immediately conducted a voir dire examination of the entire jury. This revealed that only one juror had ever seen the article and that he had not read it. No request was made by defense counsel to replace this juror with an alternate. There is no evidence that the jurors who heard this case were preju-

7. Minutes of hearing on this application, pp. 58-59.

8. Petitioner argues that this was due to the fact that he was in jail without bail and had been awaiting trial for three months at that time. Yet when out on bail after this hearing he did not move for a continuance.

9. This is not to say that the failure to request a change in venue is a waiver of one's constitutional claims. The lack of such a request is, rather, an indication that counsel did not view the pressure of publicity as did counsel in *Sheppard, Estes* and *Irvin*.

diced. This is not a case like *Irvin*, where "continued adverse publicity caused a sustained excitement and fostered a strong prejudice among the people of" the community. *Irvin* v. *Dowd, supra,* at 726.

A balance must be kept between the public's right to be informed of public proceedings and the accused's right to a fair trial. Vigilance against the secret trial must be balanced with vigilance against the televised trial. The trial of this petitioner was clearly within constitutional bounds.

SEARCH AND SEIZURE

Petitioner has alleged that he was denied the due process of law by the trial court's failure to accord him a hearing on the question of the admissibility of what petitioner characterizes as the "fruits of an unlawful search and seizure" and its admission into evidence over defense counsel's objection. The evidence in question is a chair which had been in petitioner's 63rd Street apartment the day of the murder and on which there was a minute trace of blood the source of which was not ascertainable. The police procured the chair, without a search warrant, from a warehouse at which Gloria had stored it, using a pseudonym. She testified that petitioner had told her, "Get rid of all the furniture in the apartment, and get rid of the rug; get rid of everything." (P. 1169). It seems that Gloria, with Mr. Broudy's help, did, in fact, dispose of the rug. (P. 1170). Petitioner was insistent that she quickly dispose of all the furniture, and when she was proceeding too slowly he said, apparently to prod her, "Just get rid of it. I don't care what you do with it." (P. 1174). In the process Gloria

gave a television set to Broudy (p. 1175) and stored the rest of the furniture (pp. 1174-75).

Even assuming the claim was properly preserved, as did the New York Court of Appeals, 18 N.Y.2d 162, 169, petitioner has no standing to assert the violation of any constitutional rights as to this seizure. To have standing "the movant [must] claim either to have owned or possessed the seized property or to have an interest in the premises searched." *Jones* v. *United States,* 362 U.S. 257, 261 (1960). "[T]he rule [is] that the fact that evidence has been seized from A in violation of A's rights does not prevent its admission in a prosecution of B." *United States* v. *Granello,* 243 F. Supp. 325, 327 (S.D.N.Y. 1965) (relating the rule in *United States* v. *Wong Sun,* 371 U.S. 471 [1963]), *aff'd,* 365 F.2d 990 (2d Cir. 1766). See also, *United States* v. *Bozza,* 365 F.2d 206, 222-23 (2d Cir. 1966) and *Staples* v. *United States,* 320 F.2d 817, 820-21 (5th Cir. 1963). Petitioner's right to privacy under the Fourth and Fourteenth Amendments to the United States Constitution was not invaded. That he had no interest in the stored furniture is made clear by the fact that Gloria threw away the rug and gave the television set to Broudy. It appears abundantly clear that the last thing petitioner wanted was a possessory interest in these articles, or any connection with them. Petitioner cannot now complain of this seizure since Gloria had petitioner's authority to dispose of the chair.

Even were petitioner to have standing, relief would have to be denied. Petitioner had abandoned the property, as much as if he had thrown it into a public wastepaper

basket.[10] There is nothing unlawful in the Government's seizure of property in this situation. *Abel* v. *United States*, 362 U.S. 217, 240-41 (1960). One cannot throw something away and then claim that constitutional rights have been violated by the police in picking it up. *Hester* v. *United States*, 265 U.S. 57, 58 (1924).[11]

DENIAL OF PRETRIAL MOTION FOR DISCOVERY

Petitioner claims he was denied the due process of law by the court's refusal to grant his pretrial motion for examination of the bullets found in the deceased's body. There is no violation of petitioner's rights on this ground. The bullets and ballistics report were in court under the defendant's subpoena and, as the trial court observed, "were his to utilize as he saw fit" (P. 3904). No request

10. The question of abandonment is one of federal constitutional law, not of state property law. As the Supreme Court said in Jones v. United States, 362 U.S. 257, 266 (1960):

> . . . it is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical.

11. Work v. United States, 243 F.2d 660 (D.C. Cir. 1957) and United States v. Merritt, 293 F.2d 742 (3d Cir. 1961) are inapposite. In *Work*, the court, over a vigorous dissent, found that the movant had not abandoned property for constitutional purposes by tossing it into a trash can beneath *his porch*. In *Merritt*, the court did not find a voluntary abandonment when the illegal search precipitated the throwing of the evidence out of the window. Petitioner, in this case, had voluntarily severed his connection with the furniture and it was placed on premises in which he had no interest. Thus, although the evidence was to be used against him, he was not in the class the constitutional prohibition against illegal searches and seizures was meant to protect. See, United States ex rel. Coffey v. Fay, 344 F.2d 625, 628 (2d Cir. 1965), Diaz-Rosendo v. United States, 357 F.2d 124, 132 (9th Cir. 1966), cert. denied, 385 U.S. 856 (1966).

was made for a recess to examine the bullets or look at the ballistics report. There is no prejudice to the defendant shown by these facts. Petitioner further contends that he was prejudiced by the "erroneous and misleading" testimony of the police ballistics expert. Petitioner cannot now claim a violation of his rights after his pretrial request was substantially fulfilled at trial and after he had a full opportunity at trial to avoid any prejudice. Petitioner has pointed to nothing that would establish prejudice resulting from the fact that his request was substantially fulfilled at trial rather than before.

USE OF SPECIAL JURORS

Petitioner's final contention is that the use of a special (Blue Ribbon) jury under form Section 749aa of the Judiciary law of New York violated his Sixth Amendment right to an imparital jury and the equal protection and due process clause of the Fourteenth Amendment. The constitutionality of the use of special jurors under this statute has been specifically upheld by the Supreme Court in two cases, *Fay* v. *New York,* 332 U.S. 261 (1947) and *Moore* v. *New York,* 333 U.S. 565 (1948). Petitioner's contention is without merit. *Vanderwyde* v. *Denno,* 113 F. Supp. 920 (S.D.N.Y. 1953).

Petitioner's application for a writ of habeas corpus is denied.

Motion denied. It is so ordered.

Dated: New York, N. Y.
October 13, 1967

Edmund L. Palmieri
EDMUND L. PALMIERI
U. S. D. J.

APPENDIX IV

Opinion and Order of United States District Judge Edmund L. Palmieri, December 1, 1967, Granting Petitioner's Motion for a Certificate of Probable Cause

UNITER STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

67 Civ. 2514

UNITED STATES OF AMERICA, *ex rel.* MARK FEIN,
Relator,

against

JOHN T. DEEGAN, Warden of Sing Sing Prison, State of New York,
Respondent.

PALMIERI, J.

The relator's motion for a certificate of probable cause pursuant to 28 U.S.C. §2253 is granted. It is so ordered.

This conclusion has not been reached without difficulty in view of this Court's opinion of October 13, 1967, adverse to the relator's contentions. However, in the light of the dissenting opinion of Chief Judge Fuld of the Court of Appeals of the State of New York (18 N.Y. 2d 162, 272 N.Y.S. 2d 753 [1966]) I believe that I should not permit my views to present an obstacle to appellate scrutiny.

Appendix IV

Relator's counsel has urged two points for the first time on this application: the allegedly prejudicial opening remarks of the trial court addressed to the jury at the very outset of the trial, and the suggested invalidity of the two Supreme Court decisions (*Fay* v. *New York*, 332 U.S. 261 (1947) and *Moore* v. *New York*, 333 U. S. 565 (1948)) cited by this Court in support of its view that there was no invasion of the relator's constitutional rights by the use of a special (Blue Ribbon) jury under New York State laws. Although these contentions are not appropriately raised at this time, they have nevertheless been considered.

It is my view that the allegedly prejudicial remarks cannot be construed in the light attributed to them by the relator. They were part of a much longer statement, the essential meaning of which was an expression of caution with respect to the defendant's rights in a criminal trial.

Insofar as the alleged invalidity of the Supreme Court decisions is concerned, the argument is based upon the suggestion that by its decision in *Parker* v. *Gladden*, 385 U.S. 363 (1966) (a case which involved a gross interference with a deliberating jury in a criminal trial), the Supreme Court has indicated its readiness to disavow its previously expressed views upholding the constitutionality of the New York blue ribbon jury statute. I do not concur in this view. I adhere to the conclusion expressed in the opinion which is based upon the Supreme Court decisions to which I have already referred.

Dated: New York, N. Y.,
December 1, 1967.

/s/ Edmund L. Palmieri
EDMUND L. PALMIERI
U.S.D.J.

APPENDIX V

Opinion of Judge Kenneth B. Keating for the New York Court of Appeals, July 7, 1966, *People* v. *Fein*, 18 N.Y. 2d 162, 272 N.Y.S. 2d 753, 219 N.E. 2d 274

STATE OF NEW YORK
COURT OF APPEALS

1. No. 511. 65

THE PEOPLE &c., *Respondent*

vs.

MARK FEIN, *Appellant.*

KEATING, J.:

On November 8, 1963, a Harlem River drawbridge operator spotted a body later identified as Rubin Markowitz, a bookmaker, floating in the river. The last known contact with the deceased was a telephone call from him at 4:00 p.m. on October 10, 1963. Death was caused by four .22 caliber bullet wounds.[1]

The defendant is a business man with a wife and three children living in comfortable circumstances but also addicted to gambling and association with prostitutes. He maintained an apartment on 63rd Street under the fictitious name of "Weissman" for his extra-marital activities and contributed large amounts to the support of a prostitute known by numerous aliases but hereinafter referred to as

1. For a fuller statement of the facts, see the opinion below (24 A D 2d 32).

Gloria Kendal. Gloria, who procured entertainment for defendant's friends as well as engaging in prostitution herself, was the primary witness for the prosecution.

In essence, her testimony—and the People's case—was that sometime after 5:00 P.M. on October 10, 1963, defendant telephoned her (Gloria lived on 73rd Street) from the Weissman apartment and urgently requested her presence. She complied and upon her arrival he exhibited a trunk, admitting that he had shot his bookmaker, to whom he owed money from the recent World Series, and stuffed the body into the trunk. After defendant pleaded for her assistance, Gloria called a friend, David Broudy, who immediately left his Bronx apartment. In the meantime she asked defendant if he were sure Ruby was dead. Defendant allegedly responded in the affirmative and lifted the trunk lid exposing part of an arm, some new clothesline and some white material that looked like a shirt.

In addition to Broudy, a Miss Geri Boxer, who was to have picked Gloria up at the latter's apartment but was told by one Sandra Ede that Gloria was at the Weissman apartment, appeared at the apartment. These two, along with Gloria, loaded the trunk into a station wagon rented by defendant and drove to Gloria's apartment. Gloria went inside for a while and then returned to the others outside. The three then drove around, finally stopping on Harlem River Drive and throwing the trunk into the river. Gloria also threw in two duffle bags, one of which contained pieces of carpet from the apartment.

Defendant was convicted upon a jury verdict of Murder in the Second Degree and sentenced to State prison for

thirty years to life. After a full post-trial hearing, defendant's motion for a new trial was denied. The Appellate Division affirmed the judgment.

Defendant's contention that the use of a special jury deprived him of his constitutional right to a fair trial has been considered before and found to be without merit. (*Fay* v. *New York*, 332 U.S. 261; *Moore* v. *New York*, 333 U.S. 565).

Similarly, the record fails to support defendant's claim that unfavorable publicity aroused such prejudice in the community that he was deprived of a fair trial. The publicity in question for the most part took place at the time of arrest, nearly eight months prior to trial. Defendant's own counsel argued on a habeas corpus hearing four months prior to trial that the effect of publicity had long since passed and defendant was ready to go to trial. Finally, defendant never even sought a change of venue. (See *Stroble* v. *California*, 343 U.S. 181.)

Defendant next urges that the seizure by police of a chair from a warehouse and its introduction into evidence violated his constitutional rights. The chair in question had been in the Weissman apartment at the time of the murder. The serologist who examined and tested the chair reported that signs of human blood were present on the chair. However, there were insufficient stains present to group or type the blood.

We find that even if this objection was properly preserved, it has no merit. The facts show that defendant voluntarily relinquished all right, title and interest to the chair with an intention of terminating forever his ownership in it. Defendant abandoned his interest and retained

no rights in the chair which could be breached by its subsequent seizure by law enforcement officers.

Defendant also argues that the Appellate Division abused its discretion in failing to consider his appeal from the denial of his motion for a new trial on the ground of newly discovered evidence. It is clear, however, from the opinion of the Appellate Division (24 A D 2d 32) that the alleged newly-discovered evidence was fully considered by the court and found insufficient to warrant a new trial.

Moreover, it is well settled that this court has no power in a non capital case to review the discretionary order denying a motion for a new trial. The right to a review of such an order ceases at the Appellate Division. (*People* v. *Bonifacio*, 190 N.Y. 150; *People* v. *Luciano*, 275 N.Y. 547; *People* v. *Girardi*, 303 N.Y. 887; *People* v. *Mistretta*, 7 N.Y. 2d 843, 844.)

Although the evidence brought out at the post trial hearing on the motion for a new trial would, therefore, not normally be before us, since the hearing was so complete and extensive evidence was taken, much of which could be considered on a *coram nobis*, we have considered the merits of defendant's evidence.

The only serious question which arises from this evidence concerns defendant's contention that facts brought to light at the post trial hearing establish a failure of the prosecution to disclose material exculpatory evidence, thus denying defendant a fair trial. Specifically, defendant points to four instances of alleged suppression: the ballistics report of Detective Kelly, the testimony of Sandra Ede, the testimony of Mrs. McNair and Mrs. Bennett, and the testimony of Mrs. Generazio.

Appendix V

The objection in the first instance has little substance. The Kelly report of an inconclusive naked eye examination was in no way contradictory to, but was fully superseded by, the microscopic examination and analytic tests by Detective O'Brien who testified and was subject to cross-examination. Both the O'Brien report and the Kelly report were in the physical possession of the court during the entire trial pursuant to a subpoena by defendant and were fully available to defendant. In short, there was neither suppression of evidence nor was the evidence in question exculpatory. (See *Jordon* v. *Bondy,* 114 F.2d 599, 602.)

Similarly, the testimony of Sandra Ede, a prostitute who spent a good deal of time in Gloria's apartment and frequently took messages, was in no way suppressed. Sandra, who was under psychiatric care when she testified at the post trial hearing, consistently advised all representatives of the prosecution that she could not recollect the events of October 10, 1963.

Faced with an unstable and uncertain witness, whose testimony would add nothing to his case, the prosecutor cannot be faulted for choosing not to call her to the stand. However, he did the next best thing in providing the defense with the information. At the close of his case, the District Attorney in open court recalled who Sandra was and stated that since she claimed to have no recollection, he was not calling her to the stand. He then gave her name and address to defense counsel so they could do whatever they wanted with it. Defense counsel, who already knew about Sandra, chose not to call her either. Clearly, evidence is not suppressed when the defendant has such a knowledge of it.

Appendix V

Mrs. McNair and her daughter Mrs. Bennett lived two floors below the Weissman apartment. Defendant claims that their testimony that they heard shots from the rear of the building (the Weissman apartment was towards the front) on the day of the murder was suppressed by the People. Again, the questions are presented as to whether there was suppression and whether the evidence was exculpatory.

Mrs. Bennett told the investigators that she dated Mr. Kassow (one of the original lawyers for defendant) and had told him of hearing the shots and of seeing a trunk in the apartment lobby prior to the murder. Mr. Kassow himself testified that Mrs. Bennett had told him of seeing the trunk but when he asked her if she had heard any shots, she replied in the negative.

The testimony is conclusive that, regardless of what Mrs. Bennett *actually* told Mr. Kassow, the district attorney had no reason to believe that he knew anything that defendant did not know. Moreover, the trial court found, and we concur, that these women possessed no exculpatory evidence. The prosecutor and Detective Leman testified that the women told them by word and hand gestures that the shots had come from up and towards the front of the building, which corresponded to the Weissman apartment. The women had little knowledge of guns or gun shots yet they claimed to have heard from the alley three floors below—through an open window—four very loud sounds which scared them and which they were certain came from a gun; this despite the fact that .22 caliber shots make a comparatively small report. The words of the Trial Judge,

who had an opportunity to observe these witnesses, best sum up their testimony:

> "Taking their credible testimony in the most favorable light, each testified that some time in late September or early October 1963, they heard four to six loud noises which came through their living room window . . . late in the afternoon. I find no basis for believing that they recognized the sounds as gunshots, partly because Mrs. Bennett long ago denied hearing shots when questioned by the defendant's first attorney of record, Mr. Kassow, and partly because of their lack of expertise. Mrs. Bennett's recollection that she only discussed having seen a large steamer trunk in the lobby of the building during the same period—but not the 'shots' because of the trial assistant's request that she not discuss it with anyone is completely inconsistent with her demeanor at the hearing. This voluble witness was simply incapable of restricting her desire to talk."

The Judge further noted that they misdated their interview by several months, failed to remember their description of the trunk from one week to the next, and that the only probable explanation for inconsistencies in various testimony was that they told the prosecutor an entirely different story from that which they recollected at the hearing. The prosecutor, having been told by the witnesses that defendant's attorney was informed and the information being *at best* very tenuous, could not be expected to come forward with the pointless task of repeating that information.

The defendant's claims with regard to Detective Kelly, Sandra Ede and the Bennett-McNair testimony are perfect

examples of why the public prosecutor—an experienced trial lawyer—must have *some* area in which he is permitted to judge, in the context of the entire case, the value of evidence to the defense in terms of its potential impact on the jury; he must have *some* discretion in determining which evidence must be turned over to the defense. These claims are examples of why no court has ruled that *every* statement obtained by the district attorney or the results of *every* avenue of investigation pursued by him must be disclosed to the defense regardless of its materiality, credibility or potential impact on the trier of fact. As Judge Hastie has stated in a frequently cited passage (*United States ex rel. Thompson* v. *Dye,* 221 F.2d 763, 769 [3rd Cir. 1955], cert. den. 350 U.S. 875), there are many situations in which a prosecutor can fairly keep to himself his knowledge of available testimony which he views as mistaken or false. But there are other circumstances in which a prosecutor should know that even testimony which he honestly disbelieves is of a type which in all probability would make it every persuasive to a fair-minded jury. It is not every case in which the prosecution must reveal the availability of testimony inconsistent with government contentions, but in special circumstances non-disclosure may amount to fundamental unfairness in a criminal trial.

With regard to Mrs. Dagmar Finch Generazio, defendant claims not only the suppression of her testimony but also the countenancing by the prosecution of false testimony by two of its witnesses regarding a confrontation between Gloria and Dagmar preceding a recantation by Gloria. He argues that this additional fact of false and

perjurious testimony automatically requires a new trial under our decision in *People* v. *Savvides* (1 NY 2d 554).

Dagmar Finch Generazio was a prostitute friend of Gloria Kendal whom Gloria allegedly called on the day of the murder seeking a car to move the box. During the investigation Dagmar told the prosecution varying stories as to the time she received the call but mainly told them that it was after 6:00 P.M. She had claimed to be in Gloria's apartment that afternoon to meet a man but when he did not appear, she left around 4:00 P.M. According to her story she went to Gail Weiner's apartment (where she allegedly received the call) arriving there between 6:00 and 7:00. At the post trial hearing, however, she testified that she was in Gail's apartment and was certain she received Gloria's call there between 3:00 P.M. and 4:00 P.M.

At the close of Gloria's direct testimony, the prosecutor called defense counsel to the bench and there made a statement for the record. In this statement he explained that twice in the course of his investigation Gloria had recanted her testimony about hearing defendant admit the shooting and seeing the body in the trunk. The first recantation does not concern us as there is no question raised concerning it. With regard to the second, the prosecutor said that on September 28, 1964, in his office, Gloria had recanted and on September 30 she said she had lied two days previously. This information was provided so that defense could cross-examine Gloria about it.

It appears that prior to the second recantation Dagmar had been brought to the District Attorney's office and there

confronted Gloria with the story that Gloria had called Dagmar at Gail's apartment some time between 6:00 and 7:00 or possibly later. Gloria denied the call, called Dagmar a liar and then started yelling and screaming that Detective Leman was getting people to lie about her. The detective took Dagmar from the room and Gloria demanded to call her lawyer. Thereafter Gloria recanted for the second time and it is with regard to these circumstances that the defendant charges the prosecution with countenancing false testimony.

In the first place, the record amply sustains the finding of the court below that the testimony in question was not in fact false or perjurious (see 24 A D 2d 42). While it may be that Gloria and Detective Leman failed to disclose the presence of Dagmar prior to Gloria's recantation, nowhere in their testimony can we find statements actually false or perjurious.

Moreover, the mere labelling of testimony as "false" does *not* change the nature of the inquiry and require an automatic reversal. Whether the charge be false testimony or suppression of exculpatory evidence, the principles are the same. The defendant is entitled to a fair trial without trickery or overreaching by the prosecution, and the question is whether the prosecutor's conduct negated that right. The principle is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused (*Brady* v. *Maryland*, 373 U.S. 83, 87).

While the principles governing false testimony and suppression are similar, it may be that the tests will differ slightly because intentional false testimony will sometimes

be conclusive evidence that defendant was denied a fair trial. For example, in a case like *Savvides* where the prosecutor knows of a blatant lie by a witness on a material issue, it is clear that defendant's trial has not had that element of fairness which our justice demands. The resulting prejudice to *Savvides* could not be characterized or discounted as harmless (*Savvides, supra,* p. 557). Likewise, there will be cases of suppression equally offensive to our sense of justice for the same reason. As Judge Friendly has concluded,

> "the strictness of the application of the harmless error standard seems somewhat to vary, and its reciprocal, the required showing of prejudice, to vary inversely, with the degree to which the conduct of the trial has violated basic concepts of fair play." (*Kyle* v. *U.S.,* 297 F.2d 507, 514.)

Our approach is in accord with that of the United States Supreme Court. In *Napue* v. *Illinois* (360 U.S. 264), where the district attorney failed to correct his witness' false testimony that he had received no promise of consideration, the court made its own examination of the facts and the importance of the testimony. The court's own statement of its holding indicates there is no rule of automatic reversal:

> "As previously indicated, our own evaluation of the record here compels us to hold that the false testimony used by the State in securing the conviction of petitioner may have had an effect on the outcome of the trial." (360 U.S., p. 272.)

Similarly, our examination is directed at the prejudice caused to defendant and the effect on the outcome of the

trial by the possible concealment of, or misleading testimony regarding, Dagmar Generazio.

It should be noted, on behalf of the district attorney, that Dagmar's story of receiving a phone call from Gloria at Gail Weiner's apartment was steadfastly denied throughout the pre-trial investigation by both Gloria and Gail, and, even if true, fitted with the prosecution's theory that Gloria may have called Dagmar while she was in her apartment and Broudy and Boxer were outside in the station wagon with the trunk. Moreover, defendant knew about Dagmar and her story of a phone call and even cross-examined Geri Boxer with regard to her knowledge of Dagmar. In fact, defendant's investigator mentioned to Detective Leman in a hallway conversation that defendant knew of the phone call, and he even asked whether the prosecutor was going to put Dagmar on the stand.[2] Thus, the prosecutor had good reason for failing either to see anything of an exculpatory nature in Dagmar's testimony or to perceive the defense's inability to locate her.

As a matter of fact, under the difficult circumstances of this entire case, the district attorney and his staff—in turning over Sandra Ede's name, offering the evidence of Gloria's recantations, and correcting various testimony by Gloria just to mention a few instances—have combined a strong sense of fairness with a high degree of expertise.

Concealment or non disclosure, however, is not ruled out by the good faith of the prosecutor, and, without in

2. The testimony indicates that when Leman asked if the investigator had called Dagmar's mother in Baltimore, the latter requested the mother's number but was refused. There was *no* request for the name, address or phone number of Dagmar nor any indication that the defense could not locate her.

any way condoning the failure of the prosecutor to disclose affirmatively Dagmar's presence prior to the recantation and her story of the phone call, our decision must rest on an examination of the evidence involved, its materiality and prejudicial effect, and most important, its possible effect on the jury. (*People* v. *Kingston*, 8 N.Y. 2d 384, 387; *People* v. *Rosario*, 9 N.Y. 2d 286, 291; Code Crim. Pro., §542.)

Even *if* the jury had chosen to believe that Gloria's recantation resulted from what Dagmar said rather than her anger at Detective Leman, the effect of Dagmar's testimony would only have been to challenge Gloria's credibility. This the defense attacked so relentlessly at trial that we cannot possibly see how the further challenge as to whether she made a phone call could possibly have affected the jury verdict.

The defense questioned her along her entire road of deviation from the moral norm, while the prosecution made no effort to counter or mitigate this. The prosecutor himself, in summation, referred to Gloria as "infamous", "notorious", "the morals of an alley cat", "a moral leper", and "an old whore". Yet the jury apparently considered the various corroborating witnesses such as Geri Boxer and David Broudy and the circumstances of defendant's rental of the station wagon and his meeting with the deceased, and believed just enough of Gloria's testimony to convict defendant. We fail to see how Dagmar's evidence could have changed this.

The Trial Judge, who had an opportunity to hear and study Dagmar and her testimony, made certain findings

regarding her evidence and we cannot improve on his expression of those findings:

> "Having seen and heard this witness, I reject her testimony as totally unworthy of belief. While under oath at the hearing, she strained with tireless effort to avoid telling the truth, whether the examination covered her recorded criminal past, the date of her marriage, the frequency which the police telephoned her, or the reaction of Gale Weiner Tracy, a witness called by the prosecution after she submitted a sworn question and answer on behalf of the defendant, upon a certain confrontation. The foregoing are all measurable standards, but of no greater import than the impression this witness created when set against less tangible marks. I find that she never told the prosecution of receiving a call on any afternoon, I further find that insofar as this witness' credibility is concerned, her story that she received any call from Mrs. Lazarus [Gloria] on the day, or month, of the killing does not warrant belief."

Though there are cases holding it to be of no consequence that evidence in question bore upon the prosecution witness' credibility rather than directly upon defendant's guilt, here the chain from the evidence to the prosecution witness is quite indirect and must first bridge the gap of Dagmar's incredibility. Even then it is either cumulative or peripheral. In no case cited by defendant, where the failure to call attention to evidence has required a new trial, has the evidence been so remote from the issue of guilt or so speculative.

The evidence here was not evidence which would have had an effect on the jury's determination The prosecutor's

act did not deprive defendant of a fair trial and the People's conduct of the case was not so contrary to fundamental concepts of justice and did not constitute a denial of due process.

Defendant's remaining arguments were adequately dealt with in the courts below and we find no merit to them. Defendant has had one fair trial and we have found no defect or error requiring a reversal or a grant of a second trial.

The judgment of the Appellate Division should be affirmed.

APPENDIX VI

Dissenting Opinion of Judge Fuld

FULD, *J.* (dissenting).

I am reluctant to vote for affirmance in this case in view of the conceded nondisclosure and concealment by the prosecution of evidence which, in my judgment, might well have persuaded the juroros to reach a different verdict. Although the defendant points to several such items, I direct myself to but one of them. The record reveals that a Mrs. Dagmar Generazio had given the prosecution information which was at odds with the trial testimony of the People's key witness, Gloria Kendal, and that such information had not been disclosed to the jury or to the defense. Such information suggested—or, at least, so the jury could have found—that Gloria, rather than the defendant, was responsible for the murder and thus had a compelling motive to accuse him of the crime. Since the case against the defendant admittedly depended on the testimony of Gloria, there is heightened significance in the fact, likewise not revealed, that Gloria had actually been confronted with this information, as well as by Mrs. Generazio herself, in the district attorney's office immediately before she recanted (for the second time) her story against the defendant.

The concept of fairness, of due process, imposes upon the prosecution a duty to apprise the defense of evidence favorable to the accused, particularly when such evidence contradicts the testimony given by the People's witnesses in open court. (See *Brady* v. *Maryland,* 373 U.S. 83, 87; *Napue* v. *Illinois,* 360 U.S. 264; *Alcorta* v. *Texas,* 355 U.S. 28; *Mooney* v. *Holohan,* 294 U.S. 103; *Levin* v. *Katzenbach,*

363 F.2d 287; *Barbee* v. *Warden,* 331 F.2d 842; *People* v. *Robertson,* 12 NY 2d 355; *People* v. *Zimmerman,* 10 NY 2d 430; *People* v. *Savvides,* 1 NY 2d 554). This duty persists even though the defense might, by dint of a little more effort, have independently uncovered the evidence in question and even though the district attorney regards it as lacking in probative force or worthless. The prosecution is not privileged "to decide for the court what is admissible or for the defense what is useful". (*Griffin* v. *United States,* 183 F.2d 990, 993.)

The argument that disclosure would not have changed the verdict "overlooks the variant functions to be performed by jury and reviewing tribunal." (*People* v. *Savvides,* 1 N.Y. 2d 554, 557, *supra.*) It is for jurors, not judges of an appellate court such as ours, to decide the issue of credibility, and we should be particularly observant of this principle in the case before us, where disclosure might well have impeached the one witness without whom there would admittedly have been no prosecution. In this view, it "matters little" that the district attorney's silence was not the result of guile or a desire to prejudice. (*People* v. *Savvides,* 1 N.Y. 2d 554, 557, *supra.*) "The principle of *Mooney* v. *Holohan* [294 U.S. 103, *supra*]," as the Supreme Court has pointedly observed (*Brady* v. *Maryland,* 373 U.S. 83, 87, *supra*), "is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused."

I would reverse and order a new trial.

Chief Judge DESMOND and Judges VAN VOORHIS, BURKE, SCILEPPI and BERGAN concur with Judge KEATING; Judge FULD dissents in a separate opinion.

Judgment affirmed.

* * *

APPENDIX VII

Remittitur of New York Court of Appeals, July 7, 1966, as Amended Pursuant to Order Dated September 22, 1966, 18 N.Y. 2d 722, 274 N.Y.S. 2d 159

1. No. 511. 65

THE PEOPLE &c., *Respondent,*

vs.

MARK FEIN, *Appellant.*

BE IT REMEMBERED, That on the 17th day of November in the year of our Lord one thousand nine hundred and sixty-five, Mark Fein, the appellant in this cause, came here unto the Court of Appeals, by Phillips, Nizer, Benjamin, Krim & Ballon, his attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court and for the First Judicial Department. And The People &c., the respondent in said cause, afterwards appeared in said Court of Appeals by Frank S. Hogan, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Louis Nizer, of counsel for the appellant, and by Mr. Eric A. Seiff, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, and thereafter a motion to

amend the remittitur having been granted this remittitur is hereby amended by adding thereto the following: Upon the appeal herein there was presented and necessarily passed upon the following question under the Constitution of the United States, in addition to the other constitutional questions expressly passed upon in the opinion, viz.: Appellant contended that the order of the Supreme Court denying his pretrial motion for discovery and inspection of the bullets found in decedent's body deprived him of a fair trial. The Court of Appeals held that the appellant's constitutional rights were not violated.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be affirmed, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, by the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York

Appendix VII

Court of Appeals, Clerk's Office,
Albany, July 7, 1966.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON
Clerk.

COURT OF APPEALS

State of New York, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 7th day of July in the year of our Lord one thousand nine hundred and sixty-six, before the Judges of said Court.

Witness,

THE HON. CHARLES S. DESMOND,
Chief Judge, *Presiding.*
RAYMOND J. CANNON,
Clerk.

REMITTITUR July 7, 1966

APPENDIX VIII

Remittitur of New York Court of Appeals, July 7, 1966, as Amended Pursuant to Order Dated February 21, 1967, 19 N.Y. 2d 691, 278 N.Y.S. 2d 880

THE PEOPLE &c.,

Respondent,

vs.

MARK FEIN,

Appellant.

BE IT REMEMBERED, That on the 17th day of November in the year of our Lord one thousand nine hundred and sixty-five, Mark Fein, the appellant in this cause, came here unto the Court of Appeals, by Phillips, Nizer, Benjamin, Krim & Ballon, his attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the First Judicial Departmen. And The People &c., the respondent in said cause, afterwards appeared in said Court of Appeals by Frank S. Hogan, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Louis Nizer, of counsel for the

appellant, and by Mr. Eric A. Seiff, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, and thereafter a motion to amend the remittitur having been granted this remittitur is hereby amended by adding thereto the following: Upon the appeal herein there was presented and necessarily passed upon the following question under the Constitution of the United States, in addition to the other constitutional questions expressly passed upon in the opinion, viz.: Appellant contended that the order of the Supreme Court denying his pretrial motion for discovery and inspection of the bullets found in decedent's body deprived him of a fair trial. The Court of Appeals held that the appellant's constitutional rights were not violated.

And thereafter a motion to further amend the remittitur having been granted this remittitur is hereby further amended by adding thereto the following: Upon the appeal herein there was presented and necessarily passed upon the following question under the Constitution of the United States, viz.: Appellant contended that the order of the trial court, subjecting him to a trial before a special jury rather that a general jury, denied him a fair trial and deprived him of due process and the equal protection of the laws. The Court of Appeals held that the appellant's constitutional rights were not violated and that former Section 749-aa of the Judiciary Law authorizing such a trial is constitutional.

Appendix VIII

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be affirmed, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, by the Justices thereof, &c.

RAYMOND J. CANNON,
Clerk of the Court of Appeals
of the State of New York.

Court of Appeals, Clerk's Office,
Albany, July 7, 1966.

Appendix VIII

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON,
Clerk.

COURT OF APPEALS

State of New York, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 7th day of July in the year of our Lord one thousand nine hundred and sixty-six, before the Judges of said Court.

Witness,

THE HON. CHARLES S. DESMOND,
Chief Judge, *Presiding.*
RAYMOND J. CANNON,
Clerk.

REMITTITUR July 7, 1966

Original Remittitur Filed Jul 18 1966
Supreme Court
New York County
Appeal Bureau

Amended Remittitur Refiled Mar 1 1967
Supreme Court
New York County
Appeal Bureau

APPENDIX IX

Denial of Review, *Fein* v. *New York*, 385 U.S. 649 (1967)

FEIN *v.* NEW YORK

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 793. Decided January 23, 1967.

18 N. Y. 2d 162, 219 N. E. 2d 274, appeal dismissed and certiorari denied.

Louis Nizer, Paul Martinson and *Bennett Boskey* for appellant.

Frank S. Hogan for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted.

Denial of Rehearing, *Fein* v. *New York*, 386 U.S. 978 (1967)

March 20, 1967. Petition for rehearing denied.

APPENDIX X

Opinion of the Appellate Division, First Department, October 19, 1965, 24 A.D. 2d 32, 263 N.Y.S. 2d 629

SUPREME COURT

APPELLATE DIVISION—FIRST JUDICIAL DEPARTMENT

BREITEL, P.J., RABIN, EAGER, STEUER, WITWER, JJ.

THE PEOPLE of the State of New York, *Respondent*

vs. 9251

MARK FEIN, *Defendant-Appellant.*

Appeal from a judgment of the Supreme Court (Gerald P. Culkin, J.), rendered May 26, 1965, in New York County upon a verdict convicting defendant of the crime of Murder in the Second Degree.

Louis Nizer of counsel (*Robert Arum, Paul Martinson, Harold Klapper* and *George Berger* with him on the brief; Phillips, Nizer, Benjamin, Krim & Ballon, attorneys), for appellant.

Eric A. Seiff of counsel (*H. Richard Uviller* with him on the brief; *Frank S. Hogan, District Attorney*), for respondent.

STEUER, *J.*

In the early morning of November 8, 1963, Fred Petraca, a stationary engineer who operated the Spuyten Duyvil

Appendix X

Drawbridge of the New York Central Railroad noticed a body floating in the Harlem River. The body was later identified as the remains of Rubin Markowitz, a part-time grocery clerk whose main occupation had been the booking of bets on sporting events. Investigation revealed that the deceased was last seen by his family on the morning of October 10, 1963, and the last known contact with him was a telephone call to one of his customers at 4 o'clock that afternoon.

Further investigation developed that the deceased did a large part of his book-making business by telephone. For this purpose he employed an answering service. The procedure was for the customer to call the service and leave a telephone number at which he could be contacted. Markowitz called the service at half-hour intervals, received the numbers and made the calls. In these arrangements the customers were given fictitious names. One of these names was "Shore" and the telephone number was that of an apartment at 125 East 73rd Street. The tenant of this apartment was a Mrs. Carmela Lazarus. She was a woman with an extraordinary number of aliases, who at the time was known as Gloria Kendal. It was through her that the prosecution learned of the defendant. And it was through her and by virtue of the information given by her that the defendant was charged with homicide and convicted by a verdict of the jury of Murder in the Second Degree.[1]

1. Following conviction a motion was made for a new trial on newly discovered evidence. The motion was denied. The notice of appeal embraces that determination, but no error in that decision was urged on appeal. Nevertheless, we have given attention to the testimony elicited, where appropriate to the points raised.

Appendix X

The defendant challenges the validity of the verdict and judgment of conviction, advancing some 17 specifications of error. We have examined all of these but find that only six merit discussion. These six can be conveniently treated under three headings—whether the evidence was sufficient to convict beyond a reasonable doubt; whether the District Attorney suppressed exculpatory evidence; and whether the prosecution countenanced false testimony, knowing it to be false, and failed to correct it.

In bare outline, the case of the People was that the defendant, on October 10, at about 5 o'clock in the evening telephoned Gloria Kendal and urgently requested her to come at once to an apartment located at 406 East 63rd Street. Upon her compliance he told her he had killed Markowitz and exhibited his body, which was resting in a trunk. At defendant's suggestion she procured the services of two friends, and the three of them took the trunk in a station wagon to the end of Dyckman Street at the Harlem River and dropped the trunk into the river.

There is no contradiction of the testimony giving this sequence of events, but defendant challenges it on the grounds of inherent improbability, variance with physical and known facts, and the unreliable character of the testimony used to establish it.

The first argument rests on the character of the defendant. It appears that he is a business man, married and the father of three children. He and his family lived in very comfortable circumstances, and he was possessed of substantial resources. He had no prior criminal record and no history of violence was established. It is claimed that it

is highly improbable that one so circumstanced would engage in a homicide where the only suggested motive was to escape payment of a debt of some $7,000.

The reverse of this picture must also be considered. Defendant had long been addicted to betting substantial sums with bookmakers. He also indulged in extensive association with prostitutes. It clearly appears that he not only contributed largely to the support of the Kendal woman, he also maintained the 63rd Street apartment for extra-marital activities. While these activities might have been well within the limits of defendant's financial competence, there was evidence that on occasion he did borrow to meet his expenses for this double life. Money difficulties were therefore not entirely to be ruled out. Nor did the prosecution's case rest on the motive of robbery. This was merely advanced as a possible explanation. The jury might well have found that the defendant, having chosen to inhabit the half-world that he did, would be subject to the stresses, and the methods of relieving them, that are more common to its denizens than to those whose activities conform more strictly to conventional standards.

The defendant advances several grounds for claiming that the physical facts belie the narration of events by the prosecution witnesses. We will consider these separately. The testimony was that, after the trunk containing Markowitz' body was loaded on the station wagon, the vehicle was driven to the 73rd Street apartment, where Miss Kendal got out and went to her apartment. The station wagon remained parked in the street. The two persons remaining with it estimate the time that they waited for her as be-

tween 30 and 45 minutes. She places it at far less—about 10 minutes. The seriousness of this incident lies in the claim that a bleeding body would be liable to attract attention and that Miss Kendal's assistants would never have taken such a risk. To counteract this, there is no proof that the body was bleeding at the time, and some hours after death it does not appear that it would be. Furthermore, the testimony was that defendant stated that he had placed canvas bags in the trunk to absorb any blood and prevent leakage. Lastly, it was for the jury to say whether people who would undertake an enterprise of this nature would be so worried about such a contingency that they would not possibly have waited for this period of time.

Next it is claimed that it was a physical impossibility for these three to have lifted the trunk out of the station wagon and to have dropped it over the wall which borders Dyckman Street. Markowitz in life weighed about 185 pounds. There is no proof of the weight of the trunk, but for the purposes of this argument we will assume that the claim that it weighed 50 pounds is sufficiently accurate, thus making the total weight about 235 pounds. The wall in question is about four feet high. The proof of the lifting and carrying is not particularly detailed. The three people involved were: Miss Kendal, five feet seven inches tall and weighing about 135 pounds. She describes herself as a particularly strong woman. Broudy, the only man taking part, was an inch taller, and weighed 165 pounds. He had been a taxi driver for most of his adult life. Miss Boxer's dimensions do not appear, and the record is not consistent as to how much assistance she lent the other two. In view

of the very short distance the trunk would have to be carried (about 7 or 8 feet) and the fact that in the lifting a portion of the weight could be made to be borne by the wall itself by canting the trunk, plus the fact that the jury had ample opportunity to judge the strength of these persons, we believe that it cannot be said that this testimony represented a physical impossibility.

The defendant also contends that if the trunk were dumped into the river at 179th Street on October 10, the body could not have been found on November 8 at Spuyten Duyvil, some three miles away. Admittedly, the record is barren of any scientific proof as to whether or not these facts are physically inconsistent. The point was never raised until after the trial.[2] From the testimony in the case, it did happen, and there is nothing to show in this highly controversial area that it could not have happened.

Finally on this phase of the argument the defendant points to the absence of any evidence of blood on the furniture or walls of the 63rd Street apartment. From the medical testimony it is fairly conclusive that the deceased must have shed a considerable quantity of blood. None of the three witnesses who were in the apartment on the evening of October 10 saw any blood on the furniture, and an examination of the furniture disclosed only one minute speck on a chair. This speck was so small that it could not be typed. As proof that the homicide took place in the apartment,

2. Testimony to this effect was offered on the motion for a new trial. We do not find it to be of such conclusive nature that the interests of justice would require a new trial; and on the question of whether the jury verdict was proper, it cannot, of course, be considered.

it can be disregarded. However, there was evidence that a section of the carpet had been cut away prior to the arrival of the witnesses at the apartment and the resulting strips of material were in a duffle-bag. This bag was taken in the station wagon along with the trunk, and similarly disposed of.

We conclude that these facts do not demonstrate that the homicide could not have occurred in the apartment, nor that the narration of facts by the People's witnesses is factually impossible. It is true they raise issues but in no sense do they preclude a finding that no reasonable doubt existed.

We come now to the question of the reliability of the testimony. It is not disputed that Mrs. Lazarus or, as she was generally referred to on the trial, Gloria Kendal, was a completely amoral person who could well merit the defense's description as a depraved character. It has, however, often been recognized that crimes in the category here under review are seldom committed in the presence of reliable and substantial witnesses. Either such crimes must go unpunished or the jury must be allowed to make a determination that on this occasion the testimony reflects what actually happened (see *People* v. *Peller*, 291 N.Y. 438, 446). Such a determination most frequently is largely influenced by the relationship of the testimony from the doubtful source to facts established from more certain origins. Applying that test it will be found that the record reveals as follows:

The defendant on October 10 owed the deceased $7,000. A friend of his, one William Tishman, owed the deceased

about $14,000. Defendant arranged with Tishman to pay off both debts on October 10, the money being supplied mostly from the proceeds of a loan on collateral supplied by the defendant. Tishman was to give the defendant his share but was unable to do so, and gave a note. Defendant, in a statement to the police, claimed that he had paid the entire debt to the deceased on the afternoon of October 10. Miss Kendal saw the Tishman note in defendant's possession when she was at the apartment in the early evening of October 10. So that some contact between the deceased and the defendant on the day in question was abundantly established.

Miss Kendal's testimony was that on her arrival at the 63rd Street apartment the immediate question considered was the disposal of the trunk containing the body. For this purpose she enlisted the aid of David Broudy, a friend of hers, who came to the apartment in response to her call. Broudy came in his brother's automobile but, when he saw the trunk, he told the defendant that he could not get it into his car. The defendant thereupon arranged for the rental of the station wagon. The latter fact is established by the records of the rental company and the unimpeached testimony of its officer and of the employee who turned over the station wagon to the defendant. Miss Kendal testified that she went with the defendant to the rental agency and the rental agent of the 63rd Street apartment building testified that he saw them leave the apartment together at the time she indicated. Furthermore, it appears without doubt that the defendant tried to conceal the fact that he had rented the station wagon by disputing the car rental charge and laying a trap to confuse the employee who turned over

the station wagon to him. So the defendant's connection with the disposal of the body as testified to by Miss Kendal was amply established.

It also appeared that defendant misinformed the police in the early stages of the inquiry as to his connection with the apartment on 63rd Street and his relationship with both the deceased and Miss Kendal. The apartment was rented in the name of William Weissman, though the defendant paid the rent in cash, bought the furniture, and later terminated the lease, paying the rental until the apartment was re-rented. The only record connection was that his name appeared as a reference for the fictitious Weissman in the application for a telephone. When questioned by the police as to this, he stated that the apartment was rented by a prostitute named Margaret Foster, and that he gave the reference as a favor to his friend Tishman, who was the protector of Margaret Foster, and also the "Shore" who appeared in the deceased's books. Actually, Margaret Foster was one of the many aliases of Carmela Lazarus or Gloria Kendal.

Many other items of testimony confirm parts of the testimony given by Miss Kendal, in addition to that given by Broudy and the third member of the disposal group. It leads to the conclusion that on this very material part, the prosecution's contentions were established beyond a reasonable doubt. The only fact which rests on her unsupported testimony is that the defendant did the actual shooting.[3] Considering all the facts which corroborate her testimony

3. The defense contends that the fact that Markowitz's body was in the trunk also rests on her unsupported testimony. While no one else testifies to seeing the body, Broudy testified to an admission by the defendant to that effect.

in the related aspects of the case, we would not say that the prosecution rests on testimony so questionable that it cannot remove any reasonable doubt. Beyond that we have no function. It is for jurors not Judges of an appellate court to decide the issue of guilt (*People* v. *Mleczko*, 298 N.Y. 153, 163).

Passing now to the claims of concealment of exculpatory testimony by the District Attorney, we find that four such instances are claimed.

The first of these concerns Sandra Ede. Miss Ede was a prostitute who spent a good deal of time in the Kendal apartment on 73rd Street. Miss Kendal testified that she was in the apartment on October 10 when the defendant called. Miss Kendal had an appointment with a Miss Geraldine Boxer who was to call for her in Miss Boxer's car. Kendal testified that she told Ede she was going to 63rd Street and to tell Miss Boxer when she arrived that she had gone there and that Miss Boxer should meet her there. Miss Boxer testified that when she arrived at the Kendal apartment house she called on the intercom and the Ede woman gave her the message.

On the motion for a new trial it was established that the District Attorney interviewed Miss Ede and she refused to testify. She stated that if called she would testify that she was not in the apartment at the time and consequently never received the message; that she had never spoken to Miss Boxer on the intercom; and that on the afternoon in question she was in her own apartment to see to the installation of a telephone. Concededly the District Attorney gave the defense the name and address of Miss Ede but the claim is that the full extent of her interview was not revealed.

However, it appears that whether or not it was revealed by the District Attorney or obtained through interviewing Miss Ede, the defense was well aware of Miss Ede's contentions. It appears that Geraldine Boxer, whose testimony Miss Ede contradicted, was brought to the office to confront Miss Ede. On the cross-examination of Boxer, the following occurred:

> "Q. Did Sandra deny that? A. She said she doesn't remember.
>
> "Q. Did Sandra say that she didn't talk to you on the telephone that day? A. I don't know. As far as I know, when I was there she said she didn't remember; she couldn't remember that date in particular.
>
> "Q. Wasn't some way of fixing the date discussed in the District Attorney's office? A. I don't know what you mean by fixing the date.
>
> "Q. Well wasn't there something said about the installation of a telephone? A. Yes.
>
> "Q. And didn't Sandra fix the date by the installation of a telephone, and did she not say that she did not speak to you that afternoon, because her telephone was being installed in some other place? Did she say that? A. I believe she said her telephone was being installed, but I also believe that the time element was not asserted."

It therefore appears that all the Ede statements were known to the defense. Despite this knowledge the defense did not call her as a witness. The contention of concealment was not proved.[4]

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4. It is also significant that despite the elaborate preparation and presentation on the motion for a new trial, the obvious method of verifying the Ede version, by the telephone company records, was not resorted to.

Appendix X

The second alleged failure to disclose concerns the information of Mrs. Bennett and her mother, Mrs. McNair. These ladies were tenants of an apartment in 406 East 63rd Street. They occupied an apartment in the rear of the building, whereas the "Weissman" apartment was in the front. They were interviewed by the police and told them that on the afternoon of October 10 they heard pistol shots which they believed emanated from the alleyway beneath their windows and in the rear of the house. Concededly the defense also interviewed these ladies before the trial but it is claimed they never revealed this information. As there were several interviews it is difficult to see what else could have been discussed, as these women did not profess to have any other relevant information.

The third alleged failure is in regard to Mrs. Generazio, an associate of Miss Kendal in the practice of prostitution. She also used many names. In an interview with the District Attorney she told the prosecution that at 3 o'clock in the afternoon of October 10th the Kendal woman had telephoned her asking her to procure an automobile to transport a large box. Her story varied from time to time from negation of the call to placing it at 9 o'clock that evening, but at the time of the hearing it had crystallized to the early afternoon, preceding a certain television program which she watched. The District Attorney never gave the results of these interviews to the defense, nor did he volunteer the name and address of the witness. That the defense was aware of her existence is undeniable—counsel asked about her on cross-examination, using one of her aliases. A Mr. Whelan, an ex-police officer who was hired as an investiga-

tor by the defense, asked one of the detectives for her address. The detective replied that he was not at liberty to disclose it. The defense did not pursue the matter further, and no request was made by counsel of anyone else to the District Attorney.

Lastly, it is claimed that the prosecution suppressed a ballistics report by the Police Department. Far from being suppressed, the report was subpoenaed and was in the courtroom at all times in common with all other reports made by police officers. When defense counsel wished to examine or use any of there reports, he asked for them and was immediately accommodated. He never asked for this report. The claim is that it should have been called to his attention.

The suppression by the prosecution of evidence favorable to an accused upon request violates due process if the evidence is material to guilt or punishment, irrespective of the good faith of the prosecutor (*Brady* v. *Maryland,* 373 U.S. 83). Although the requirement of a request for the suppressed testimony has not to our knowledge been obviated by any subsequent expression of the Supreme Court, we prefer not to place our decision on the absence of any request in the claimed instances of suppression. We have noted that this requirement has been stated not to be a *sine qua non* (*United States* v. *Wilkins,* 326 F. 2d 135). On the other hand, we cannot believe that it is the law that every statement by a person interviewed by the District Attorney must be disclosed to the defense regardless of its materiality or probable veracity merely because the defense, after the event, claims that it might have made use of it. Mr. Justice White, concurring in *Brady* (*supra,* P. 92) stated

specifically: "I . . . would not cast in constitutional form a broad rule of criminal discovery." Nor do we believe that any such all-embracing rule has been enunciated. It must be apparent that in a many faceted investigation such as the instant prosecution, a great many persons will necessarily be interviewed. Avenues of investigation will prove to be dead-end streets. We have not yet reached the point where we substitute for the adversary system a process whereby the defense is to be kept advised of every step taken by the prosecution. Rather, we think the true test of what must be disclosed is that of simple fairness. The opposing considerations were well expressed by Judge Hastie:

> "It seems likely that many situations will arise in which a prosecutor can fairly keep to himself his knowledge of available testimony which he views as mistaken or false. But there are other circumstances in which a prosecutor must, or certainly should know that even testimony which he honestly disbelieves is of a type or from a source which in all probability would make it very persuasive to a fair minded jury." (*United States* v. *Dye*, 221 F. 2d 763, 769.)

While a matter of essential fairness cannot be fixed by express rule or be the subject of precise definition, a brief review of what has been considered unfair may make decision more uniform. In *Brady* (*supra*), the evidence suppressed was one of three confessions made by a co-defendant. In the two supplied he charged the defendant with firing the fatal shot, in the one withheld he admitted he fired it; in *United States ex rel. Almeida* v. *Baldi* (195 F. 2d 815), the caliber of the fatal bullet, differing from the caliber of the defendant's revolver, was concealed; in *U.S.* v. *Wilkins*

(*supra*) and in *Wilde* v. *Wyoming* (362 U.S. 607), the testimony of two reputable eyewitnesses to a robbery to the effect that the defendant was not one of those participating was withheld; in the *Dye* case (*supra*) where the intoxication of the defendant was offered to show absence of intent, the arresting officer who had stated he believed the defendant to have been intoxicated was not called; in *United States ex rel. Montgomery* v. *Ragen* (86 F. Supp. 382) in a prosecution for rape, the report of an examining physician that the complainant had not been violated was suppressed. Examples could be multiplied, but these are believed to be typical. In two of the cases the reputable character of the witnesses was an important factor in determining that the practice was unfair. In the others, it was the controlling nature of the evidence.

Applying these rules to the alleged instances in the case at bar, we find that in the Ede testimony and the ballistics report there was no ground for even a claim of suppression. As regards Bennett and McNair, even if suppression could be found—which we doubt—the evidence was of such a tenuous nature that even the fairest minded prosecutor would not feel called upon to advise the defense. As for the Generazio testimony, this was clearly not from a source that a jury would be expected to credit. And in view of defendant's knowledge of the witness and that she had some connection with the case, the prosecutor was entitled to assume that any further disclosure would be requested. In no case that has come to our attention has the failure to call attention to evidence whose bearing on the issue of guilt been so remote and speculative been considered suppression.

Appendix X

There is also a claim that the District Attorney sat by while testimony was given that he knew to be false. It appears that twice during the preparation of the case Miss Kendal told the District Attorney that she would not testify that the defendant admitted the killing or that she saw the body in the trunk, and that her previous statements to this effect were untrue. Upon completion of her direct testimony, the District Attorney disclosed these incidents to the defense. Both she and the detective present were cross-examined as to them. As to the first recantation, no question is raised. It appears that the second recantation immediately followed an interview in which the Kendal and Generazio women were brought together. In the interview Miss Kendal became incensed at Mrs. Generazio, berated her and finally refused to remain in the room with her. The latter was excused and left. Miss Kendal then turned her wrath upon the detective, accusing him of seeking witnesses to discredit her and using Gestapo methods. He was excused and then she made her recantation. The question was asked as to who was present at the interview. Miss Kendal said she did not remember. The detective named the assistant district attorney but did not name Mrs. Generazio. Technically speaking, this testimony was correct, because at the time of the recantation she was not present. But it was not an accurate statement as to those present at the interview.

The principles behind the rules governing the situation where the District Attorney sits by and allows false testimony to be given and that where the prosecutor suppresses exculpatory evidence are the same. The principle is still

that the defendant is entitled to a fair trial without trickery or overreaching by the prosecution, and the question is whether the District Attorney's conduct negated that right (*People* v. *Savvides,* 1 NY 2d 554). Without a showing that the questioned testimony was false to the knowledge of the prosecution, no unfairness is established (*People* v. *Fanning,* 300 N.Y. 593).

The cross-examinations in which the alleged false testimony was given were not directed to the point on which the testimony was inaccurate. As regards the Kendal woman, the efforts of counsel were to show that the words of the recantations amounted to unequivocal admissions that the earlier statements were in fact false. This was followed by an endeavor to obtain an admission that the recantation represented the fact. With the detective the effort was to show that the recantation was not, as Kendal claimed, the consequence of sympathy for the defendant and remorse for the destruction of his family life. In a way counsel proved his point—that the motive given was false—but he also established a reasonable motive, annoyance with the police investigators. The significant point is that who was present at the interview was not emphasized and actually received only cursory attention. The matter of the recantations was only a small part of extended cross-examinations. When it is considered that the District Attorney participated in a very large number of interviews, his failure to correct what appeared to be an incidental fact in regard to one of them is not shown to be deliberate nor an effort to overreach the defense. This view is strengthened by the fact that the whole subject of the recantations was revealed

to the defense by the same Assistant District Attorney and the defense without that revelation was entirely without information of it. And the revelation was made in a highly ethical manner which drew the express approval of defendant's trial counsel.

The Judgment of conviction should be affirmed.

BREITEL, J. P., RABIN, EAGER and WITTWER, JJ., concur.

Judgment of conviction unanimously affirmed.

APPENDIX XI

Opinion of Supreme Court, New York County, May 26, 1965, Denying Motion for New Trial

SUPREME COURT, NEW YORK COUNTY
SPECIAL AND TRIAL TERM, PART XXXVII

THE PEOPLE OF THE STATE OF NEW YORK

against

MARK FEIN, *Defendant.*
Indictment No.
760/64

CULKIN, J.:

The defendant was indicted for the crime of murder in the first degree on February 25, 1965 and after a trial by jury was convicted of murder in the second degree.

The defendant in an effort to obtain a second trial of the indictment made certain motions. The grounds set forth, which are many and varied, can roughly be divided into 4 categories:

1. Suppression of the evidence by the prosecution.
2. Newly discovered evidence.
3. Verdict against the weight of the evidence.
4. Miscellaneous arguments.

These groups will be treated in inverse order.

The defendant's contention that a chair was improperly introduced at the trial because it was previously illegally seized by the police is completely unsupported by the record. While counsel had objected to the introduction of this exhibit at the trial, there was no evidence adduced in support of an earlier conjecture of his that it might have been

unlawfully seized. Indeed, after the witnesses for the prosecution testified, defense did not seek a voir dire on the issue of the unlawful means of the seizure. The court found that said chair had been plainly abandoned by the defendant.

Defendant's contention that prejudicial newspaper publicity "influenced the jury" is a totally unwarranted charge. In fact, indications are exactly to the opposite, for at least one juror was exhaustively questioned by a representative for the defendant during the course of this trial motion and the defense announced its contention of speaking to other jurors on this very subject. Without examining the propriety of this (see People v. DeLucia, N.Y. 2d , 258 N.Y.S. 2d 377 [1965]) it is a fact that not one offer has been forthcoming which would tend to connect newspaper and magazine stories with the jury's deliberations. The defendant never sought a change of venue.

Defendant is in error when he contends that it should have been left for the jury to determine whether Mrs. Lazarus (Gloria Kendal) was an accomplice. A requested charge was refused because not one scintilla of evidence was adduced tending "to justify the inference that the offender has counseled or induced or encouraged the crime." (People v. Swersky, 216 N.Y. 471 [1916]). Defendant confuses "inference" with "speculation" when he points to certain inconsistencies in the testimony of witnesses for the prosecution and labels these as the basis for his conclusion that Mrs. Lazarus may have been an accomplice. The only reasonable conclusion that can be drawn from defendant's analysis of the evidence goes to the credibility of the witnesses in question, and was properly passed on

by the jury—it being entirely foreign to the issue of accomplice.

Defendant also argues that the verdict is against the weight of the evidence. There is no support for this assertion. The theory of the defendant rests upon the claims of inconsistent and contradictory bits of testimony heard at trial, the implausibility of the crime, and the incredibility of some of the witnesses, all of which were fully explored by his able counsel. Suffice it to say that neither the theory of the People's case nor the nature of the evidence was suspect as a matter of law. In fact, it is fair to observe that both the quality and the quantity of the proof submitted to the jury was unexceptional; it is not unlike that of countless other cases.

The defendant has tendered a variety of items that is labeled as newly discovered evidence. Despite the effort and ingenuity expended, it is clear that much of what is offered is not evidence at all. The remainder has already been passed upon by the jury. In addition, no explanation is offered as to why almost everything that is now adduced could not have been with diligence adduced before or during the trial. This ground alone would be conclusive in most instances.

A significant portion of defendant's offer rests on the affidavit submitted by Dr. Sidney Weinberg. Dr. Weinberg's testimony is offered in refutation of the People's alleged failure to explain the absence of the flow of blood from the deceased, the ability of two witnesses to lift a body-filled trunk over a retaining wall, and the duration during which the deceased would have remained submerged after being deposited in the river. Each of his conclusions

rests upon a statement of facts not supported by the record. The proof at trial did not show an absence of blood; on the contrary, a corner of a rug had been cut away and some time had elapsed before the first prosecution witness arrived on the scene. Opportunity was clearly present for the removal of any stains. What the record reflects is a lack of concern—or desire—by both counsel to elaborate on the subject before the jury.

Similarly, the defendant's suggestion that the trunk in question weighed fifty pounds is totally gratuitous. There is no justification for such a surmise and the mere fact that one was found by the defense in a lower Broadway store after the trial would not bar the prosecution from coming forward with one one-fifth that weight. However, each such offer would be equally impermissible. Moreover, not only were all of the pertinent facts before the jury, but no qualifications have been set forth as to Dr. Weinberg's special expertise in this highly conjectural area. Finally, the estimate that the deceased would have floated to the river surface within two weeks (the prosecution's case indicated four weeks), is based on the premise that the body was "otherwise free floating"; since this basis is not founded on fact, Dr. Weinberg's conclusion must necessarily fall.

Defendant's recovery of an electric switch box from the bed of the Harlem River some eighty feet from the point where the deceased had been thrown in, has no place in this proceeding. There is no showing that the object recovered was ever in the trunk, either during its transportation to the river wall or, indeed, in the defendant's apartment. The defendant insists such an association can be drawn because of affidavits he offers that conclude it is "consistent" with

known scientific principles that this switch box may have been submerged since October, 1963. He is in error; this is not a sufficient basis to have admitted the switch box in evidence during trial. Furthermore, there is no showing why these diving operations could not have taken place before trial. His failure to ascertain the site must be considered the result of his failure to inquire. His late claim, that he would have been given the wrong hour on which to base his diving calculations, is conjectural at best.

The defendant also proffers the names of present and past members of Mrs. Lazarus' family (Messrs. Barton, Schlessinger, Lazarus); the names of two men who rented the apartment adjoining his 63rd Street dwelling (Messrs. Vanderholm, Champion); and Hans Bruno Kahl, as all being worthy of both investigation and jury attention. The offer in this application is, of course, improper, as even the defendant seems to recognize for the latter three men are not tendered as the basis for a new proceeding—but an investigation, and the former three were all utilized by the defense during its cross-examination of prosecution witnesses at the trial. Moreover, the affidavits proffered on behalf of Messrs. Champion, Vanderholm and Kahl have been thoroughly discredited by the collapse of supportive statements and an inconsistent and inaccurate recount of chronology. Furthermore, rules of evidence would preclude Mr. Kahl's story, for, with all its other problems, it is merely hearsay.

Defendant also proffers newly discovered evidence of the location of the shots, absence of a witness from Mrs. Lazarus' apartment—contrary to trial testimony, uncovery of a phone call made by Mrs. Lazarus on the day of the

shooting, and further ballistic information, all of which he contends mandate a second trial. Since these are all intimately associated to his charge of prosecutorial suppression of evidence, they will be examined together. The defendant contends that he has evidence to show that two weapons were used to kill the deceased. But the entire structure of his arguments rests on evidence that was before the jury. Thus, the jury knew that one bullet was lighter than the three others, and that fragments from that bullet had lodged in the brain of the deceased. When the defendant's present expert concludes that two guns were used, he fails to take into account the evidence that was produced in conjunction with the autopsy and therefore rests his analysis on a distorted basis.

Similarly, when defendant's expert O'Gorman analyzes the testimony of Detective Haase and concludes that an inconsistency is present regarding the number of murder bullets on which lands and grooves are discernible (at one point he clearly indicates just one and at another implies all), that he is offering now what was open for cross-examination. Besides not agreeing with defendant's analysis of the testimony, its proffer is plainly untimely. The matter was before the jury.

When the defendant argues that the prosecutor suppressed a ballistics report prepared by Detectives Haase and Kelly, he is being unfair. Pursuant to his subpoena, those reports, and all others prepared by the police in this case, were in the court's possession during the trial. They were his to utilize as he saw fit; his choice having been made, he is bound by it. Moreover, his charge that the police reports contained material helpful to him is unfounded. There

was nothing in Detective Haase's report that was not explored in front of the jury and when Detective O'Brien testified to his microscopic observation of the "three minute fragments of metallic residue," he confirmed the reason why. Detective Kelly saw no pieces of bullet in the floor boards with his naked eye. When the defendant also argues that another court committed error in refusing a pre-trial motion for discovery and inspection of the bullets, he is raising an irrelevancy. He was never refused access to the bullets at trial; and he never contended that he lacked sufficient opportunity to examine them properly. I fail to see how the defendant was prejudiced.

The defendant offered the testimony of mother and daughter neighbors of his, Mrs. McNair and Mrs. Bennett, as proof that the shots came from a direction other than the defendant's 63rd Street apartment. Taking their credible testimony in the most favorable light, each testified that some time in late September or early October 1963, they heard four to six loud noises which came through their living room window (an exposure which faced the rear of the building as opposed to the defendant's dwelling which was in front and two floors higher) late in the afternoon. I find no basis for believing that they recognized the sounds as gunshots, partly because Mrs. Bennett long ago denied hearing shots when questioned by the defendant's first attorney of record, Mr. Kassow, and partly because of their lack of expertise. Mrs. Bennett's recollection that she only discussed having seen a large steamer trunk in the lobby of the building during the same period—but not the "shots" because of the trial assistant's request that she not discuss it with anyone, is completely inconsistent with

her demeanor at the hearing. This voluble witness was simply incapable of restricting her desire to talk. Coupling the testimony of these witnesses with the information they gave to Mr. Dermody and Detective Leman (that the shots came from up above and towards the front of the building —and that Mr. Kassow had been so advised), the only reasonable conclusion is that they are completely confused. They misdated their conversation with Detective Leman by several months, failed to remember their description of the trunk from one week to the next, and as noted above inaccurately recounted the nature of the information they passed on to Mr. Kassow. That they may have told the prosecutor an entirely different story than what they presently recollect is so reasonable that it is the only probable explanation. The prosecutor, having been advised by the witnesses that the defendant's attorney had already been informed of matter which would tend to inculpate the defendant, could not be expected to come forward with the pointless task of repeating that information.

The defendant also proffered a Question and Answer from Sandra Ede which plainly states that she gave no instructions to Geri Boxer on October 10, 1963. It should be pointed out that if the prosecution had not consented to her testifying in court, a hearing was not warranted because the only indication that Miss Ede had so advised the District Attorney is the hearsay affidavit of defendant's counsel. Hearsay is clearly not a proper basis for a hearing on a motion for a new trial (*People* v. *Moore*, 29 Misc. 574, 579 [1899]; affd. 53 App. Div. 637 [1st Dept. 1900]; affd. 168 N.Y. 593). However, because of the prosecutor's willingness to explore the merits of Miss Ede's questions and an-

swers, she was permitted to testify (See *People* v. *Winkler*, 20 A D 2d 263, 265 [1st Dept. 1964]).

When Miss Ede provided and signed the questions and answers at the office of defendant's counsel she did so while being treated as an in-patient for mental illness at Jacoby Hospital—although on the advice and with the assistance of her doctor. In court she indicated, although with some ambiguity, that it was her practice not to speak to anyone over the intercom, and it is clearly this general procedure that she refers to in the questions and answers. But it is equally certain that this witness, who was execptionally anxious not to be a witness—either at the trial or at the hearing—consistently advised all of the representatives of the prosecution repeatedly she could not recolleet "one way or the other" the events of October 10, 1963, or any other day during that period, with respect to her participation in a conversation over the intercome with Geri Boxer. Faced with a witness of now proven instability whom he had every reason to believe was withholding information helpful to his case, the prosecutor acted appropriately when he advised the defense of her name and address. He was under no obligation to volunteer her entire story and defendant's prayer for that proposition is rejected as unprecedented. It is also considered significant that the defendant was not only aware of Miss Ede, but interrogated Miss Boxer at the trial as to whether Miss Ede did not have a different recollection than Miss Boxer's. Miss Ede herself supports Miss Boxer's answer which was "she said she didn't remember." It is further certain that the statement by defendant's attorney concerning the inaccessibility of Miss Ede at the

time her name was tendered by Mr. Dermody at trial are inaccurate. She was avaliable as a witness past the time the defense rested, and the conclusion that the defense consciously rejected the idea of speaking with her is irresistible and is supported by their refusal to obtain an affidavit from Mr. Kleinman on this subject, in spite of this court's express request. Similarly, it is plain that the defendant charges that the prosecution harassed Miss Ede until she was driven to a mental institution is without one scintilla of proof. Miss Ede denied ever making such a charge.

The defendant proffers Dagmar Finch Generazio as basis for a new trial. Her story is that Mrs. Lazarus telephoned to borrow a car to move a box; she fixes the time as between 3 and 4 P.M. on October 10, 1963. Having seen and heard this witness, I reject her testimony as totally unworthy of belief. While under oath at the hearing, she strained with tireless effort to avoid telling the truth, whether the examination covered her recorded criminal past, the date of her marriage, the frequency which the police telephoned her, or the reaction of Gail Weiner Tracy, a witness called by the prosecution after she submitted a sworn question and answer on behalf of the defendant, upon a certain confrontation. The foregoing are all measurable standards, but of no greater import than the impression this witness created when set against less tangible marks. I find that she never told the prosecution of receiving a call on any afternoon, I further findd that insofar as this witness' credibility is concerned, her story that she received any call from Mrs. Lazarus on the day, or month, of the killing does not warrant belief. I find that she never advised the prosecution of

identifying a picture of the deceased, and when coupled with her equivocal testimony on the subject I find that she was never able to so identify it.

Sargent Russell Generazio, the estranged husband of Dagmar, testified to certain conversations had with representatives of the prosecution which corroborated his wife's story in most of the material aspects. The witness, who frankly admitted a consuming interest in winning anew his wife's affections, continuously expressed by word and deed his desire to ingratiate himself in her favor during the several days the two were in court. Viewed most charitably, his testimony does not realize the level of probity required.

A more troublesome issue arises upon Detective Leman's and Assistant District Attorney Dermody's candid admissions that Mrs. Generazio told them of receiving a call sometime in late September or early October, 1963, near or after 7 P.M. Since this court finds Mrs. Generazio unworthy of belief, it is understandable that the prosecution did. Faced with a story of doubtful relevance and a witness who was sufficiently unmindful of the truth that in her desire to become a participant in the trial, that she altered the facts as she believed would be helpful to the prosecution, Mr. Dermody called in the only person who could bear light on the issue. She, Mrs. Tracy, flatly denied the receipt of any such call at any time. Coupling this with Mr. Dermody's accurate knowledge that the defense was aware of both Mrs. Generazio and the story she related, as corroborated by the reference to her by the defense during cross-examina-

tion and Mr. Whelan at the hearing, no improper conduct can be established. In sum, I hold that a new trial is not required by the People's failure to turn over the name of this particular witness to the defense. The defense did not show sufficient diligence in seeking the whereabouts of this witness; her story was not helpful to the defense; and in any event, this witness is so unworthy of belief that further proceedings before a jury are not in order.

In connection with this phase, the defendant contends that the prosecutor was misleading when, at the trial, he objected to a defense question put to Mrs. Lazarus concerning phone calls she made and based his objection on the ground that only one call was made. This comment is taken out of context, for it is clear that the objection was founded only on the basis of improper foundation. Defendant's attorney was assuming a fact in his question that had not been received in evidence, or an inquiry made.

The argument is advanced that failure to disclose Gloria's confrontation by Dagmar was in fact depriving the defendant of a fair trial; that such information would have been invaluable on cross-examination.

As to any further attack on Gloria's credibility, suffice it to say that her character and reputation never were an issue. The defense interrogated her as to every misdeed, and every alleged act of deviation from moral principles. The People made no effort by way of mitigation—an orphan, a product of Westfield State Farm, committed at an extremely tender age, a product of State rehabilitation—but in fact characterized her in summation as an "old whore."

Appendix XI

If anyone was misled in this case it was the police, the District Attorney and Mr. Blinder, counsel for the defendant. In his sworn testimony before the jury, he stated that just a few hours before a scheduled meeting at his office with police officials concerning an official investigation concerning the defendant, he was introduced to one Gloria Kendall. He stated he did not know she and Margaret Foster were one and the same person, Margaret Foster being the person whom the police were seeking in relation to the 63rd Street apartment.

The final witness to testify was Gail Weiner Tracy. Her story does not withstand analysis. Her testimony is that although she insisted without variation for months on end that no call had come to her apartment despite the most persistent efforts of the prosecutor, a two hour conference with the defendant's attorney brought forth the vivid recollection and admission of the hour and date of such a call. Subsequently on the very day she allegedly offered this assistance to the defendant, she called the District Attorney's office and advised that the defense had tried to buy her off since her observations were harmful to their cause. Thereafter she left her home for some days in an effort to avoid process. But without detailing the unwholesome taste Mrs. Tracy's narration leaves concerning all of the circumstances immediately preceding her appearance in court, I find that on the basis of her entire testimony she is not worthy of belief. Indeed, one glaring and unexplained contradiction is her statement in the question and answer that she fixed the time of the call as shortly after 3 P.M. because she had just taken her Dilantin and Phelantin pills, and her

statement at the hearing that she took these pills only at 9 A.M. and 9 P.M. At 3 P.M. she used the Dilantin pill alone —her unvarying practice for thirteen years. If she had just taken the two pills she claims in the question and answer, the hour was obviously no where near 3 P.M. In any event, the fact that she could pinpoint the date and hour of a phone call 18 months ago with such accuracy, but remains unable to fix the day of a meeting with an attorney for the defendant the very week of the hearing indicates the want of credibility attaching to her.

The motion is therefore in all respects DENIED.

/s/ GERALD P. CULKIN
J.S.C.

GERALD P. CULKIN

Dated: May 26th, 1965.

APPENDIX XII

Materials Relating to Blue Ribbon Juries

Excerpts from 1952 Report and Study of the Judicial Council of the State of New York *

From Report (pp. 58-59):

The Judicial Council has sought to improve the general jury system to such an extent that extraordinary juries would no longer be necessary. The Council believes that every petit jury should be of uniformly high calibre and capable of giving a fair trial in any type of case. In large part the Council's recommendations for the improvement of general juries have been adopted; thus women are now eligible to serve, exemptions have been limited and general jurors must meet the standards formerly required only of special jurors. So, too, the Council's recommendations for the abolition of extraordinary juries have been adopted by eliminating foreign and struck juries (see Third New York Judicial Council Report 34, 121-128 (1937); Fourth *id.* 20 (1938)). However, despite the improvement of the general jury system, special juries are still retained in four counties.

In 1937, the Judicial Council first recommended the abolition of special juries in the counties in which they then existed on the grounds that they were unjust and unnecessary (Third New York Judicial Council Report 34, 121-128 (1937)). This recommendation has been renewed periodically (see particularly, Fourth New York Judicial Council Report 46-48 (1938), Eighth *id.* 39-41 (1942)). In 1941

* Footnotes omitted.

special juries were abolished in Westchester and Nassau Counties upon the recommendation of the officials of those counties (Eighth New York Judicial Council Report 24, 39 (1942)). Consequently special juries are now authorized only in New York, Bronx, Kings and Queens Counties.

During the past few years, two cases were decided by the Supreme Court of the United States which upheld the constitutionality of the special jury. Both were five to four decisions. In view of these cases and the fact that it is more than a decade since the Council has collated and presented fact on this subject, the Council conducted a survey for the purpose of re-evaluating its past recommendations in the light of presently existing facts. The survey is contained in this Report in Supporting Study (A) 153 to 171, *infra*.

The Council reasserts its belief that the basic concept of a special jury is repugnant to the traditional right of a person to be tried by a jury of his peers (Fifth New York Judicial Council Report 42 (1939)). In any event, the lack of necessity for the special jury and the fact that there are no truly objective standards for the selection of special jurors justify the abolition of special juries.

On the basis of the facts brought out in the survey and upon re-consideration the Council renews its recommendation that special or so-called "blue ribbon" juries for counties having a population of one million or more, under the sole provisions now left for permitting special juries and applicable only to the counties of New York, Bronx, Kings and Queens, be abolished.

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From Study (pp. 157-159):

In its Third Annual Report in 1937, the Judicial Council recommended the abolition of special juries. This recommendation has been consistently renewed since that time.

The Council's approach to the problem is indicated by the following excerpts from the Council's Fourth Annual Report to the Legislature in 1938 (pages 46-47):

> "The Judicial Council has been attempting to improve the general jury system to such a point that extraordinary juries of any kind will no longer be necessary. To this end, the Council recommended women jurors, limitations on jury exemptions, and the abolition of struck, foreign and special juries, all of which recommendations were put into effect, except the abolition of special juries. . . .
>
> "The Judicial Council believes that every petit jury should be of uniformly high calibre and capable of giving a fair trial in all cases. To attain this goal, the ordinary jury, as now provided, may be in need of improvement. It is, however, unjust and should be unnecessary to select supposedly special juries in specific cases."

Improvement in the quality of jurors on the general panel has long since been accomplished by applying to all jurors the standards which formerly were required only of special jurors, with the result that the general panel now represents a true cross section of the community.

In 1941, provisions of the statute which had permitted the use of special juries in Nassau and Westchester Coun-

ties, where, however, such juries had not been utilized, were eliminated.

In 1947 and 1948, the cases of *Fay* v. *New York* and *Moore* v. *New York,* in which the Supreme Court of the United States by five to four decisions upheld the constitutionality of the special jury law as it was then shown to have functioned by the evidence in those two cases, suggested that a re-appraisal of the application of standards under the law on a current basis might have changed the result.

In view of the above developments together with the fact that it is now more than a decade since the facts showing the operation of the special jury system were collected and presented by the Council, the Council has made this survey and re-evaluation of the subject covering the judicial years 1941 through 1950.

As a result, the Judicial Council renews its recommendation that special or so-called "blue ribbon" juries for counties having a population of one million or more, under the sole provision now left permitting special juries and applicable only to the counties of New York, Bronx, Kings and Queens, be abolished.

Conclusions that follow from the Council's survey are:

A: With respect to the use of the special jury, the special jury provisions apply only to New York, Bronx, Kings and Queens Counties. However, the special jury is used only in New York, Bronx and Kings Counties.

In New York, Bronx and Kings Counties the special jury is used:

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1. Almost exclusively in the trial of murder first degree prosecutions;

2. Almost exclusively upon request made by the district attorney.

B. Comparison between the composition of the special jury and general jury panels in the four counties where it may be used shows:

1. The special jury is no longer needed because the general jury system is producing a fair cross section of the community capable of determining any case.

2. There are no objective statutory qualifications by which the selection of special jurors may be differentiated from those selected for the general jury panel.

3. The special jury panel is a less fair cross section of the community than the general jury panel because of greater imbalance as to:

(a) occupation, there being a disproprotionate weighting in favor of "business" people as opposed to "working" people;

(b) educational qualifications;

(c) sex, there being a smaller proportion of women to men on the special jury panel than on the general jury panel.

While there are no adequate facts that prove that the special jury is a convicting jury since it cannot be assumed

that a banker is more "prejudiced" against a person accused of murder than a plumber, or that males are more prone to convict than females, or that the more educated are so inclined to a greater extent than the less educated, the special jury does not measure up to the theory that a jury should represent a fair cross section of the community.

Even though murder trials are in some respects more "important" than others, there does not seem to be any factual basis for the assumption that they are more difficult of proof or more complex or require more understanding or ability on the part of the jurors than many other types of cases. Nor can it be seriously argued that murder trials in counties of more than one million population are more intricate or difficult of comprehension than in counties of less than one million.

Trying one indicted for murder in Kings County by a special jury, aside from any question of constitutionality, but trying those similarly indicted in nearby Nassau County by a general jury does not readily appeal to reason or sound public policy.

The wisdom of sending men to the electric chair on their conviction by a jury selected under a system which four justices of the Supreme Court of the United States have condemned as unconstitutional on weaker evidence of its defects than is here presented is questionable. Especially is this true when there is a constitutional system already in existence, the merit of which is publicly testified to by judges in our courts who are in daily contact with it.

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From Study (pp. 165-166):

B. Occupation

As the defendants in the *Fay* case attempted to prove, the most significant difference between the special and general panel is occupational.

A comparison shows that those generally assumed to rate higher in the economic structure predominate on the special panel, while the general panel more nearly represents a cross section of the community. Thus, those who may be called business people (executives, insurance men, real estate men, advertising men, manufacturers, bankers, dealers in securities, accountants, auditors, and buyers) constitute a large portion of the special panel: 47% in New York County, 43% in Bronx County, 45% in Kings County and 39% in Queens County, while they make up a much smaller portion of the general panel, 23% in New York County, 24% in Bronx County, 16% in Kings County and 15% in Queens County.

On the other hand, those who may be called working people (electricians, chaffeurs, drivers, personal servants, service and repairmen, labor union representatives, bookkeepers, miscellaneous skilled and unskilled laborers, superintendents of buildings, secretaries and stenographers, and clerk) constitute a larger portion of the general panel than they do of the special panel.

The tables indicate that the special jury lists contain the following percentages of such groups: 7% in New York, 25% in Bronx, 17% in Kings and 18% in Queens, while the general panel contains 17% in New York, 36% in Bronx, 40% in Kings and 45% in Queens in the groups mentioned.

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The occupational tables indicate variations in stress from county to county. However, the trend is the same in all counties.

C. Education

The educational level on both panels varies considerably from county to county but in each county the educational level of the special panel is higher than that of the general panel. The difference between the two panels is greatest in Queens County and least in Bronx County.

Thus, the percentage of special jurors who had gone at least part way through college was 60% in New York, 21% in Bronx, 43% in Kings, and 43% in Queens, while of the general list only 41% in New York, 17% in Bronx, 20% in Kings, and 12% in Queens had done so.

Conversely, those on the special jury list who had not gone beyond primary school constituted only 5% in New York, 21% in Bronx, 5% in Kings and 4% in Queens, while on the general list the percentages were 13% in New York, 22% in Bronx, 25% in Kings and 34% in Queens.

Those on the special list who had completed high school made up 25% in New York, 33% in Bronx, 26% in Kings and 27% in Queens. On the other hand, high school graduates constituted 32% in New York, 34% in Bronx, 24% in Kings and 26% in Queens of the general list.

The educational figures indicate that the selecting officials place much greater stress on formal education in Queens County than they do in Bronx County and that New York and Kings Counties fall between the two.

A glance at the occupational table is in order in regard to education. It indicates that certain groups usually as-

sumed to have high educational and intelligence levels are rarely selected for the special list. Thus, the number of the educators, teachers, librarians, college students and social workers on the special list is nineteen in New York, none in Kings and four in Queens. The general panel indicates ninety-six in New York, thirty in Kings and five in Queens. In Bronx County the trend is seven to four the other way.

D. Sex

The percentage of women on both panels varies considerably from county to county, perhaps indicating that in some counties the selecting officials make less effort to obtain women who are willing to serve.

Women on the special panel comprise 2% in New York, 10% in Bronx, less than 1% in Kings, and 11% in Queens. On the general panel women constitute 11% in New York, 22% in Bronx, 6% in Kings and 7% in Queens.

Excerpt from April 26, 1965 Report of the Committee on Criminal Courts, Association of the Bar of the City of New York

Present law provides that the county clerk of each county having a population of a million or more (i.e., New York, Kings, Queens and Bronx Counties) is required to select from among the persons qualified to serve as trial jurors in that county a certain number of special jurors. The selection is made after each prospective special juror has been personally examined as to his qualifications by the county clerk or his designated subordinate. Certain

standards must be met but it is the county clerk or his subordinate who determines whether the person examined should become a special juror. If the juror is rejected, it is often impossible to determine whether the rejection was based upon his failure to meet the statutory qualifications or upon h[redacted] failure to meet some subjective criteria which may have [redacted] applied by the examiner.

* * *

The [redacted]ttee favors the abolition of the special jury for two reasons. First, it is of doubtful constitutionality. The United States Supreme Court upheld the special jury against constitutional attack by the barest of majorities in *Fay* v. *New York*, 332 U.S. 261 (1947) and *Moore* v. *New York*, 333 U.S. 565 (1948). In those cases, however, the majority held no more than that the evidence presented as to the allegedly unfair operation of the special jury system did not warrant a finding that either the right to due process or the right to equal protection of the laws had been violated. Sufficient evidence may now be available. See, for example, the Recommendation and Survey Relating to the Abolition of Special Juries, published in the 18th Annual Report and Studies of the Judicial Council of the State of New York (1952). The special jury may not survive another such attack upon its constitutionality.

Second, if the superior quality of the special jury was ever necessary to the proper administration of criminal justice, it is no longer so, since—as would be attested to by most New York prosecutors—the quality of the regular jury panel has considerably improved by virtue of the raising of the standards by which it is selected, as well as

through the general educational increase in the population as a whole.

In sum, since the special jury is an unnecessary institution of dubious constitutionality, it should be abolished. The abolition should extend to all cases, not merely those where the death penalty may be imposed.

APPENDIX XIII

Former Section 749-aa of the New York Judiciary Law*

§749-aa. SPECIAL JURORS IN CERTAIN COUNTIES

1. List of special jurors. The county clerk of each county of the state having a population of one million or more inhabitants, according to the last preceding federal census, shall select from the persons qualified to serve as trial jurors in such county such number of special jurors as the justices of the appellate division of the supreme court, or a majority of them of the department in which such county is situated shall, from time to time direct. The names of the persons so selected liable to serve as special jurors shall be alphabetically arranged, with their places of business and the residence of each. Such county clerk, from time to time, may cancel such selection and strike the names of such special jurors from such list and select other special jurors in their places. Persons who are selected as aforesaid by such clerk to act as special jurors shall be exempt from all other jury duty from and after the date of their selection, and they shall remain so exempt so long as they continue to be such special jurors.

2. Persons ineligible. No person shall be selected as such special juror who is by law disqualified or who claims and is allowed exemption from service as a trial juror, or who has been convicted of a criminal offense, or found

* This is the text of Section 749-aa (being also known as Article 18-B of the New York Judiciary Law) as it was in effect at the time of appellant's indictment and trial. Subsequently, Section 749-aa was repealed in its entirety by New York Laws 1965, c. 778, §3, effective September 1, 1965.

guilty of fraud or other misconduct by the judgment of any civil court or who possesses such conscientious opinions with regard to the death penalty as would preclude his finding a defendant guilty of the crimes charged be punishable with death, or who doubts his ability to lay aside an opinion or impression formed from newspaper reading or otherwise, or to render an impartial verdict upon the evidence, uninfluenced by any such opinion or impression, or whose opinion as to circumstantial evidence is such as would prevent his finding a verdict of guilty upon such evidence, or who avows such a prejudice against any law of the state as would preclude his finding a defendant guilty of a violation of such law, or who avows such a prejudice against any particular defense to a criminal charge as would prevent his giving a fair and impartial trial upon the merits of such defense, or who avows that he cannot in all cases give to a defendant who fails to testify as a witness in his own behalf the full benefit of the statutory provision that such defendant's neglect or refusal to testify as a witness in his own behalf shall not create any presumption against him.

3. Examination as to fitness; subpoena; punishment for disobedience. No person shall be selected as a special juror until he shall have been examined personally by the county clerk, his deputy, secretary, or any other employee of the county clerk's office duly authorized by the county clerk and approved by the presiding justice of the appellate division, as to his qualification and fitness to serve as a special juror. Such county clerk may issue a subpoena requiring any person within such county to attend before

him, his deputy, secretary or any other employee of the county clerk's office duly authorized by the county clerk and approved by the presiding justice of the appellate division, at a time specified for the purpose of testifying concerning the qualification or fitness of himself or any other person to serve as a special juror, and the propriety of the selection of such special juror. A person so subpoenaed must attend and testify accordingly. In case of his failure to attend and testify as required by such subpoena, or a refusal to be sworn, or to answer any legal or pertinent question, he shall be punished therefor by any justice of the supreme court as a contempt of court. A subpoena issued under this section shall be regulated by the civil practice law and rules, except that no fees are required to be paid to any person so subpoenaed. The record of the jurors selected as such special jurors, shall contain the age of each special juror so selected, his business or vocation, if any, the length of his residence in the state and county and, if naturalized, the date of his naturalization. Such record shall be a public record and shall be open to inspection.

4. Application for special jury. Whenever an issue of fact has arisen in any civil or criminal action triable in a county embraced within the provisions of this section, the district attorney, or the defendant, if in a criminal action, or either party in a civil action may apply for a special jury to try such issue. Such application may be made at any term of the supreme court appointed to be held within the county where such issue is triable, or at any term of any other court of record in which court such issue is to be

tried. It must be made upon the indictment, the plea thereto and an affidavit in a criminal action or the pleadings and affidavit in a civil action upon two days' notice to the adverse party or his attorney. Where, upon such application, it appears to the court that by reason of the importance or intricacy of the case, a special jury is required, or that the subject-matter of the indictment or the issue to be tried has been so widely commented upon that the court is satisfied that an ordinary jury cannot without delay and difficulty be obtained to try such issue, or that for any other reason the due, efficient and impartial administration of justice in the particular case would be advanced by the trial of such an issue by a special jury, the court to which the motion is made may make an order directing that such trial be had by a special jury, and such trial shall be had accordingly. The order must specify the time when the drawing of such special jury shall take place and the number of special jurors to be then drawn, the term of the court and particular day in the term when such special jury must attend. The day so specified for the attendance of the special jury must, except in the case of an order for additional special jurors drawn under subsection six of this section, be at least five days in addition to any Sunday, holiday or half-holiday, after the day specified for the drawing of the special jury.

5. Drawing; notification of jurors. At the time specified in the order the special jury shall be drawn at the office of the county clerk as provided in section six hundred and two of this chapter. A minute of the drawing must be kept by the county clerk, or his deputy, which must be en-

titled in the action in which the jury is to serve specifying the term of court and the particular day in the term when the special jurors so drawn must attend; and there must be entered thereon the name of each juror drawn. Such minute must be signed by the judge or justice and by the county clerk, or his deputy, present at the drawing and such minute so signed must be filed in the office of such county clerk. Such county clerk must notify each juror therein named in the manner provided for trial jurors, except that provisions as to intervals of time with regard to the notification of trial jurors shall not apply. Before the day specified for the atendance of the special jurors the county clerk must file with the clerk of the trial court, part or term at which the juror is required to attend, a certified copy of the minute with a return indorsed thereon or annexed thereto specifying the manner in which each juror was notified and the time and place of the service of such notice. Such return shall be presumptive evidence of the fact of such service. An affidavit of the person by whom such service shall have been made, stating the manner, time and place of such service shall accompany such return.

6. Additional jurors; drawing. If the panel of the special jurors thus drawn shall be exhausted before a jury is completed, or if the trial court shall be of the opinion that additional special jurors will probably be needed to complete the jury, the trial court may, from time to time, direct that such additional special jurors be drawn for the trial as it may deem expedient. The order must specify the number to be drawn, the time of the drawing and the

time when such additional jurors shall be required and notified to attend. Such additional drawing shall be made by the same officers authorized to draw the special jurors, either in open court in the presence of the judge or justice presiding at the trial, or at the office of the county clerk as prescribed in such order, and shall be conducted in the same manner as the original drawing and a minute thereof kept and certified as prescribed for the original drawing and the jurors so drawn shall be summoned in the same manner as those originally drawn.

7. Challenges; trial. The parties to such an action shall have the same number of peremptory challenges and the same challenges for cause to be tried in the same manner as upon a trial with an ordinary jury. The rulings of the trial court, however, in admitting or excluding evidence upon the trial of any challenge for actual bias shall not be the subject of exception. Such rulings and the allowance or disallowance of the challenge shall be final. Upon the formation of a special jury as hereinbefore provided the issues must be tried by such jury as prescribed by the code of criminal procedure or the civil practice act with respect to a jury trial in a criminal or civil action with an ordinary jury.

8. Revision of list. In each county of the state to which this section applies, the names selected and composing the special jury list heretofore complied, shall be the special jury list for such county subject to such revision thereof by striking therefrom and adding thereto the names of such jurors as from time to time the county clerk shall deem proper.

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9. Appellate division to make rules. The justices of the appellate division of the supreme court of the department embracing the county in which such special jury list shall be constituted shall make such rules and regulations not inconsistent with the provisions of his section as shall be necessary to regulate the making of the application for a special jury under the provisions of this section for the drawing and attendance of such jurors and for the proper and efficient enforcement of the provisions of this section.

10. Duties of commissioner of jurors in certain counties. In the event that the office of commissioner of jurors has been established in a county to which the provisions of this section are applicable, all of the powers and duties conferred or imposed upon the county clerk by this section are transferred to and shall hereafter be exercised and performed by the commissioner of jurors of such county.

11. Violations of section or rules, penalty. Any violation of this section, or of such rules and regulations prescribed by the appellate division of the supreme court shall be deemed a contempt of court under section seven hundred fifty of the judiciary law and such rules and regulations may be enforced as if a violation thereof were such a contempt as provided by section seven hundred fifty-one of the judiciary law.

Section 813-d3 of the New York Code of Criminal Procedure

[Relating to Motions for Suppression of Evidence Alleged to have been Obtained as a Result of Unlawful Search and Seizure]

3. When the motion is made before trial, the trial shall not be commenced until the motion has been determined, except that, in the case of misdemeanors and offenses, the court having summary jurisdiction over such crimes and offenses may, by general rule of court, provide that the hearing and determination of such motions may be referred to the trial court for determination during the course of the trial upon the consent of the district attorney, or if no contrary general rule of court has been promulgated, the court before which the motion is made shall have discretion either to entertain the motion, or to refer it to the trial court for determination during the course of the trial if the district attorney consents thereto. When the motion is made during trial, the court shall, in the absence of the jury, if there be one, hear evidence in the same manner as if the motion had been made prior to trial, and shall decide all issues of fact and law.

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IN THE

Supreme Court of the United States

October Term, 1968

No. 1280

UNITED STATES OF AMERICA *ex rel.* MARK FEIN,
Petitioner,

against

JOHN T. DEEGAN, as Warden of Sing Sing Prison,
State of New York,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

October Term, 1968

No. 1280

UNITED STATES OF AMERICA *ex rel.* MARK FEIN,
Petitioner,

against

JOHN T. DEEGAN, as Warden of Sing Sing Prison,
State of New York,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Preliminary Statement

This brief is in opposition to a petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit, to review a judgment of that Court (Waterman, Feinberg and Bartels,* JJ.) rendered March 24, 1969, affirming an order of the United States District Court for the Southern District of New York (Palmieri, J.) dated

* District Court Judge of the Eastern District of New York, sitting by designation.

October 13, 1967, denying petitioner's motion for a writ of habeas corpus. By his writ, petitioner has sought to set aside his conviction in the Supreme Court of the State of New York, County of New York (Culkin, J. and a jury) for the crime of MURDER IN THE SECOND DEGREE (former Penal Law of the State of New York, §1046). Petitioner is presently serving his sentence in State Prison for a minimum term of not less than thirty years and a maximum of life (3885).*

Prior Proceedings

On February 25, 1964, Mark Fein, the petitioner herein, was indicted for the crime of murder in the first degree (4A-5A). The following autumn he was convicted of second degree murder after a five-week trial (2262-3). Before sentence was imposed, petitioner moved for a new trial (27B-399B). Thereafter a hearing was held on certain selected issues, which lasted some three weeks; petitioner's motion was denied by the trial court in a detailed opinion which appraises both the issues and the witnesses' credibility (3894-913; Appendix to petitioner's brief, hereinafter referred to as A. App., 84a-97a).

The Appellate Division of the Supreme Court, First Department, unanimously affirmed both the judgment of conviction and the denial of petitioner's motion for a new trial [24 App. Div. 2d 32, 263 N.Y.S. 2d 629 (1965)]. That

* Unless otherwise noted, all references are to page numbers of the Record on Appeal to the New York Court of Appeals, which has been filed with this Court. Where two numbers appear on a page of the Record, the number at the bottom of the page will be used as the reference.

decision was in turn affirmed by the Court of Appeals [per Keating, J.; Fuld, J., dissenting, 18 N. Y. 2d 162, 272 N. Y. S. 2d 629 (1966)]. The opinion of the Appellate Division appears in the certified record (3953-69) and at A. App. 66a-83a. The opinions of the Court of Appeals are also appendixed to petitioner's brief (A. App. 41a-57a). After having the New York Court of Appeals amend the remittitur (A. App. 58a-60a), petitioner then appealed and, in the alternative, petitioned the United States Supreme Court for a writ of certiorari. The appeal was dismissed for want of jurisdiction (DOUGLAS, J. dissenting) and the petition for certiorari denied [385 U.S. 649 (1967)] (A. App., 65a). After having the New York Court of Appeals again amend the remittitur (A. App., 61a-63a), petitioner applied to the Supreme Court for a rehearing; his application was denied [386 U.S. 978 (1967)] (A. App., 65a).

Following the denial of the petition for a writ of habeas corpus (A. App. 25a-38a), petitioner moved for a certificate of probable cause pursuant to 28 U.S.C. 2253. Judge Palmieri's opinion granting that application appears at A. App. 39a-40a.

The opinion of the United States Court of Appeals per Bartels, J. appears at A. App., 1a; Judge Waterman's concurring opinion at A. App., 23a.

Statement of Jurisdiction

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. 1254(1).

Statement of the Case

The trial record irresistibly established the petitioner's guilt of shooting his bookmaker, one Rubin Markowitz, four times in the head and chest, and while the jury's verdict was challenged by Point XV of petitioner's seventeen-point brief to the Appellate Division, there was no attack against it in the New York Court of Appeals. The murder, which occurred in an apartment rented by the petitioner under the pseudonym "Weissman", was the bizarre culmination of petitioner's sordid double life (503-10, 1112-16, 1123, 1137-9, 1283, 1445). Though surrounded by the indicia of social standing in the community, the proof at trial revealed that the petitioner spent considerable time and money in the nether world of assignations, call girls, private parties of perversion, and heavy gambling (*ibid.*). Already deeply in debt, the petitioner lost seven thousand dollars betting against the Los Angeles Dodgers in the 1963 World Series (563, 584-7, 1113-14). The petitioner thereupon arranged with a friend that he, the petitioner, would pay the bookmaker not only the money he lost, but also some $16,690 owed to Markowitz by that friend and another (561-2, 564-6, 571, 577-84). The killing permitted petitioner to pocket the cash furnished by his fellow gamblers while writing off his own debt, a coup of almost $24,000 (565-6, 574-5, 577-8, 582, 667-9). Once

the deed was completed, however, his composure failed and he sought assistance.

He telephoned his companion and procuress, Carmela Lazarus, a woman of many aliases, whom petitioner knew as Gloria Foster (1119, 1133). Mrs. Lazarus responded, with some reluctance, to the petitioner's distress signal (1133). Before quitting her apartment, she left a hasty message with another prostitute who remained behind, one Sandra Ede, and taxied the ten blocks to the petitioner's secret lodging (1134). There the petitioner told her that he had shot his bookmaker and pleaded for assistance in disposing of the body, which he had already stuffed into a steamer trunk (1137-9). Responding, Mrs. Lazarus telephoned one David Broudy, who drove over from an adjoining county (881, 961).

Meanwhile, Geraldine Boxer, whose custom it was to meet daily with Mrs. Lazarus for a light supper before each attended her respective evening class, drove to Mrs. Lazarus' apartment (700-1, 705, 905, 1130, 1132). Miss Boxer was directed by Miss Ede, over the intercom, to the "Weissman" apartment—the murder scene (706, 708-10).

Eventually, Miss Boxer and Mr. Broudy entered the "Weissman" apartment, the latter with the cheap pair of gloves he had been directed to purchase (710-15, 749-50, 882-4, 892, 972-3, 1141). Conceding the presence of the body in the trunk, the petitioner responded to Mr. Broudy's questioning by claiming that while he was paying his bookmaker, "somebody burst in * * * shot this man and scooped up the money and left" (893). Assuaging Mr. Broudy's fears about blood leaking from the

trunk, the petitioner advised that he had lined the bottom with "some canvas bags" (894-5).

The petitioner then arranged for the rental of a station wagon from a nearby concern, and with Mrs. Lazarus he went to pick it up (723-7, 821-6, 829-33, 897-9, 1014-15). By coincidence it was the same vehicle the petitioner had rented the previous day—arguably for the purpose of transporting the then newly purchased steamer trunk to the "Weissman" apartment (838-9, 894-5, 1017-18, 1048-9, 1066, 1548-9).

The petitioner gave Mr. Broudy the keys to the vehicle and departed, at the insistence of his three helpers, for an evening's dinner engagement (731-2, 904, 1939). The two women accompanied Broudy as he drove about Manhattan looking for a place to dispose of their cargo (737, 908). After a drive of some duration, they stopped by an isolated bank of the Harlem River, and consigned the trunk and its contents to the river (737-9, 801, 908-9, 1155-6).

During the weeks which followed, Mrs. Lazarus and Mr. Broudy responded to petitioner's pleas for assistance in attempting to obliterate all evidence that might have associated either him or the crime with the "Weissman" apartment (914-24, 1159-74, 1376). Thus, holes in the floor and wall were concealed with filler and paint, the carpet was first repaired and then destroyed, the furniture and furnishings removed, and the lock changed (*ibid.*). Additionally, the petitioner told a good friend that "he had gotten rid of the apartment * * * a week or two after the

World Series" and in December directed his landlord to terminate the lease (512, 555, 557, 652).

Concurrent with these activities, the petitioner had several conferences with the police, two of his own seeking; he was accompanied by counsel (433-5, 1477, 1489, 1492, 1495-6). The petitioner's evasions and prevarications to police questioning were foolhardy attempts to mislead both law enforcement officials and, as the judge at the post-trial hearing noted, his lawyer as well (3911, 1495-7, 1500-7, 1511).

Following his conviction, the petitioner moved for a new trial, filing affidavits which fill 376 pages of the record, plus exhibits (27B-484B). A hearing was consented to by respondent on the basis of four of the many claims: the failure of the prosecution to advise the defense of the names and stories of Dagmar Finch Generazio, Sandra Ede, Vera McNair and her daughter Yvonne Bennett (486B-493B, 497B-499B, 525B, 2297).

Dagmar Finch Generazio's post-trial story was that Mrs. Lazarus telephoned her before 4:00 p.m. on October 10, 1963, seeking a car to move a heavy box (2547, 2550-1). Since the proof at trial placed the killing after 4:00 p.m., the petitioner's argument throughout has been that this is exonerating evidence which the prosecution knew of, suppressed and, indeed, covered by tendering perjurious testimony. Without, at this point, detailing the hundreds of pages of evidence on the subject,* the short answer is that

* For the convenience of the Court, the respondent has lodged with this Court respondent's certified brief to the United States Court of Appeals for the Second Circuit, the appendix to which contains a complete summary of the evidence at trial.

the claim of prosecutorial suppression is absolutely without support, for both petitioner's attorney and his investigator testified at the post-trial hearing that they knew Dagmar had been to the District Attorney's Office and knew, while the trial was still in session, that she told of receiving a telephone call from Mrs. Lazarus on October 10, 1963, seeking the loan of an automobile (2914, 2917-19, 2928, 2955, 3003-4, 3018-19).

Sandra Ede's post-trial testimony is confused and contradictory, its substance varying from a denial of being present in Mrs. Lazarus' apartment when the latter was first called by petitioner and a denial of advising Miss Boxer over an apartment intercom of Mrs. Lazarus' whereabouts (3228-30, 3301, 3306), to an assertion that she was "not sure" of what happened on October 10th (3156-7). The latter account, a claimed lack of recollection of the events of October 10th, was the story Miss Ede insisted upon prior to trial (782-3, 3375-8), and repeated before a stenographer (189B-196B) and Miss Boxer (782-3, 786). This insistence of non-involvement, which the prosecutor swore was the only story Miss Ede ever told, was fully disclosed to the defense at the conclusion of the People's case; Miss Ede's name and address were also provided (3375-8, 1746-7).

The post-trial testimony of Mrs. McNair and Mrs. Bennett concerning the source of gunshot sounds also varied markedly from their pre-trial tales (2388-93, 2888-9, 2989, 3083, 3091-2, 3126-8, 3366-8, 3370-1, 3414). But whether they believed the shots to have emanated from a direction consistent with the murder site as they advised the prose-

cutor, or from a source directly opposite as they asserted after trial (in either event, evidence of a most tenuous nature), is less significant than the fact that one of the women, Mrs. Bennett, spoke with petitioner's first attorney, Saul Kassow, Esq., about several aspects of the case prior to trial (2981, 2984, 2989). In one of those conversations, to the best of Mr. Kassow's recollection, Mrs. Bennett denied hearing any shots at all (2989).

Summary of Argument

Petitioner has presented nine grounds for reversal in six separate points. Each of his contentions, save one pertaining to the trial court's instructions to the jury, was raised in his previous application to this Court some thirty months ago (see Jurisdictional Statement, Appellant's brief opposing motion to dismiss or affirm, and Petition for rehearing in *Fein* v. *New York*, October Term, 1966, No. 793). Since that time, although petitioner has re-presented these arguments in two additional courts, not one item, or word, of evidence has been added to the record filed with this Court in the earlier proceeding. No new argument has been presented to warrant review of this case on the merits on its second appearance in this Court, and the opinions of the District Court and the United States Court of Appeals merely confirm the correctness of the decision of the New York Court of Appeals.

Point I (p. 13, infra): Dagmar was not improperly kept from the petitioner. During the trial, the defense knew that she had been to the District Attorney's Office with the story that Mrs. Lazarus had called her on the day of the

killing to borrow a car. Dagmar's address never having been requested of the prosecutor, and he in turn knowing that the defense was aware of Dagmar's tale, the prosecutor violated no constitutional duty in failing to volunteer her address. Moreover, the story Dagmar told had nothing to do with the question of petitioner's guilt or innocence. It related solely to the credibility of Mrs. Lazarus.

After hearing Dagmar tell her story at the post-trial proceeding, the *nisi prius* court found her unworthy of belief. Petitioner's allegation of prosecutorial suppression of evidence is based on her version of her disclosures to the prosecutor—a version which the state courts reasonably rejected as false, after a full and fair hearing.

There is no substantiation to petitioner's contention that the prosecution deliberately and inaccurately edited Dagmar's name out of a significant phase of the case, the pre-trial recantation of Mrs. Lazarus. The thesis which petitioner presses, that Dagmar caused Mrs. Lazarus to recant, is not supported by the evidence. What caused Mrs. Lazarus to recant can only be speculated upon. At trial she gave one explanation, Detective Leman another. Detective Leman's statement was consistent with the prosecutor's post-trial analysis. Moreover, the occurrence of the recantation in question was volunteered to the defense by the prosecutor, a disclosure worthy of commendation, and inconsistent with a deliberate effort to suppress evidence helpful to the defense. Nor did petitioner's use of this evidence create a duty of further revelations, based on unfounded theories as to the true reason for the recantation. Petitioner's inquiry at trial was geared to show merely that the recantation was true. In support of this effort the defense interrogated at length. But its inquiry

into the cause of the recantation was brief and uninterested. Its inquiry into those present was sketchy and ambiguous.

Point II (p. 29, infra): The prosecutor did not improperly keep Sandra Ede, an unstable, uncooperative witness from the defense. During trial the defense was told of Miss Ede's story and her name and address. Though perhaps unnecessary, because the defense already knew of Miss Ede's story, the proffer by the prosecutor met the highest standards of fairness. Even Miss Ede's elusive post-trial story did not relate to the petitioner's guilt or innocence, but only to Mrs. Lazarus' credibility. And the post-trial court, after hearing Miss Ede's story, found her unworthy of belief, a finding supported by the record.

Point III (p. 34, infra): Mrs. McNair and Mrs. Bennett were not improperly concealed from the defense. Mrs. Bennett was a social acquaintance of one of the petitioner's attorneys, and he questioned her before trial about the subject of her post-trial testimony. Moreover, the substance of their evidence, the direction of the sound of gunfire some months earlier, is gossamer at best. These women were also reasonably found unworthy of belief by the post-trial hearing court.

Point IV (p. 38, infra): The prosecution cannot be charged with improperly suppressing a ballistics report which was in court during the entire trial pursuant to a defense subpoena. Moreover, the substance of the report, that a police officer's naked eye inspection of a hole in a floor board revealed no ballistics evidence, was not inconsistent with the proof tendered by another prosecution witness, to wit: that a microscopic examination disclosed fragments of metallic residue.

Point V (p. 40, infra): The petitioner suffered no prejudice in failing to obtain inspection of the death bullets prior to trial. He had full opportunity to examine them during trial. The inconsistency in evidence he alleges now is drawn from confusion in syntax by the prosecution witness, not from variation in substance. In any event, it was before the jury.

Point VI (p. 42, infra): The petitioner is in no position to challenge the method by which the police seized a chair which was received in evidence against him. He had previously abandoned it, having instructed a friend to get rid of it. Moreover, petitioner has no standing to suppress this particular piece of evidence, it not having been seized from him, but from a warehouse with which he had no contractual relationship. Finally, petitioner never sought a hearing prior to trial, as he was obligated to do under New York statute, and never pressed his contingent motion for a hearing during trial.

Point VII (p. 47, infra): Petitioner has offered no evidence that the jury which convicted him, selected from a special panel, was improperly prejudiced. State exclusion of jurors because of their scruples against capital punishment is no ground for vacating a non-capital judgment. And it is not by itself tantamount to a constitutionally prohibited exclusion of a recognizable, identifiable group.

Point VIII (p. 51, infra): The court's pretrial instructions as to the People's burden of proof, and petitioner's right not to produce witnesses or testify, violated no constitutional right of petitioner. The court's charge was also constitutionally sound. In addition, petitioner has never

challenged the court's charge in any proceeding prior to this one.

Point IX (p. 55, infra): Publicity did not interfere with petitioner's right to a fair trial. Although free on bail at the commencement of trial, petitioner never sought a continuance or a change of venue. The record is devoid of evidence showing that publicity improperly infected the trial proceedings.

POINT I

Failure to supply petitioner with Dagmar's address in no way deprived him of a fair trial; moreover, her existence and her story were known by the defense [answering petitioner's brief, pp. 13-27, 45-50].

Petitioner's prime contention, one of the eight present claims which he also raised in this Court two years ago, is that the prosecution, "[i]n an excess of zeal," deliberately chose "to suppress Dagmar [Finch Generazio] and the testimony she could give" (brief, p. 13). But far from being "successfully edited out of the case" by the prosecution (*ibid.*), both Dagmar and the tale she told were known to the defense while the trial was yet in progress.

Dagmar, a prostitute, was the friend whom Mrs. Lazarus allegedly telephoned seeking a car to move a box (2550-1, 2554). When questioned by the police and prosecutor on several occasions, Dagmar fixed the hour of the call variously between 6:00 p.m. and 9:00 p.m., on a day in late September or early October, 1963, recalling that she received it while at Gail Weiner Tracy's apartment (2300-7, 2315-16, 2370-6, 3344-9, 3352, 3357). At the hearing Dagmar testified that the call came between 3:00 and 4:00 p.m.

on October 10, 1963, and that, with but one brief exception, she had repeatedly so advised the prosecution (2547, 2550-1, 2599, 2728, 2805). Both statements were false.

At the same hearing, her husband, who was present when Dagmar was first interrogated by the police, corroborated, with some embellishments, that part of her account (2467-9). Gail Weiner Tracy, the girl with whom the then-single Dagmar was living, confirmed that a "week or so" before her October 13th birthday she answered the telephone and the caller, Gloria (Mrs. Lazarus), asked to speak to Dagmar (3523, 3527, 3594, 3683). Mrs. Tracy gave Dagmar the receiver and then heard her say, "no, no, no" into the telephone (3573). Mrs. Tracy noted, with some confusion, that the call came shortly after she took her three o'clock epilepsy pills (3594, 3600-1, 468 B). But she also conceded that during the seven month period she had discussed the subject with the prosecutor, she had, with but one post-trial equivocation, invariably denied altogether the occurrence of such a call and had, on one occasion, done so in Dagmar's presence (3530-3, 3535-8, 3541).

On the other hand, the trial assistant, Vincent J. Dermody, testified that when he first spoke to Dagmar she told of receiving a phone call from Mrs. Lazarus sometime in the latter part of September or early October and placed the time by inquiring "could it have been around 8 or 9 o'clock?" (3344-5, 3352). In an effort to fix the hour of the call more precisely, Dagmar recounted the events of that day in some detail, finally concluding that it occurred "sometime after seven o'clock possibly between six and seven, but I'm not sure. * * * All I know is that it was dark out, and when I entered the building the dry cleaning

n n was getting ready to close his store'' (3345-9). She never retracted this account of her activities nor claimed confusion (3360).

On a second visit to the District Attorney's Office, Dagmar confronted Gail Weiner Tracy with her story of receiving a phone call at her house ''sometime after or between 6:00 p.m. and 7:00 p.m. (3357). Before she could finish, Mrs. Tracy called her a liar, saying she never received a call on her phone from Mrs. Lazarus at any time (3357). Mrs. Tracy never retracted this denial (3384).

On a third visit to his office, Dagmar again assured Mr. Dermody that the late September or early October call came between 6:00 pm and 7:00 p.m., ''or even possibly later'' (3360-1, 3499).

Detective Leman testified to several conversations with Dagmar, including one at her house (2298-9). He was told that the call she had received from Mrs. Lazarus occurred ''Maybe it was eight o'clock or nine o'clock'' and, ''after six and close to seven p.m.'' (2315-16, 2372, 2431).

After hearing all the witnesses, the trial court found Dagmar Generazio a completely untruthful witness and rejected her testimony that she had received a call at any time. With customary thoroughness, the court, describing the basis for this conclusion, wrote:

> ''Having seen and heard this witness [Dagmar Finch Generazio], I reject her testimony as totally unworthy of belief. While under oath at the hearing she strained with tireless effort to avoid telling the truth, whether the examination covered her recorded

criminal past, the date of her marriage, the frequency which the police telephoned her, or the reaction of Gail Weiner Tracy * * * upon a certain confrontation. The foregoing are all measurable standards, but of no greater import than the impression this witness created when set against less tangible marks. I find that she never told the prosecution of receiving a call on any afternoon. I further find that insofar as this witness' credibility is concerned, her story that she received any call from Mrs. Lazarus on the day, or month, of the killing does not warrant belief'' (A. App., 93a).

* * *

''Sergeant Russell Generazio, the estranged husband of Dagmar, testified to certain conversations had with representatives of the prosecution which corroborated his wife's story in most of the material aspects. The witness, who frankly admitted a consuming interest in winning anew his wife's affections, continuously expressed by word and deed his desire to ingratiate himself in her favor during the several days the two were in court. Viewed most charitably, his testimony does not realize the level of probity required'' (A. App., 94a).

* * *

''Her [Gail Weiner Tracy] testimony is that although she insisted without variation for months on end that no call had come to her apartment despite the most persistent efforts of the prosecutor, a two hour conference with the defendant's attorney brought forth the vivid recollection and admission of the hour and date of such a call. Subsequently on the very day she allegedly offered this assistance to the defendant, she called the District Attorney's office and advised that the defense had tried to buy her off since her observations were harmful to their cause. Thereafter

she left her home for some days in an effort to avoid process. But without detailing the unwholesome taste Mrs. Tracy's narration leaves concerning all of the circumstances immediately preceding her appearance in court, I find that on the basis of her entire testimony she is not worthy of belief. Indeed, one glaring and unexplained contradiction is her statement in the question and answer that she fixed the time of the call as shortly after 3 P. M. because she had just taken her Dilantin and Phelantin pills, and her statement at the hearing that she took these pills only at 9 A. M. and 9 P. M. At 3 P. M. she used the Dilantin pill alone—her unvarying practice for thirteen years. If she had just taken the two pills she claims in the question and answer, the hour was obviously no where near 3 P. M. In any event, the fact that she could pinpoint the date and hour of a phone call 18 months ago with such accuracy, but remains unable to fix the day of a meeting with an attorney for the defendant the very week of the hearing indicates the want of credibility attaching to her" (3912-13, A. App., 96a-97a).

The court clearly had power to dispose of this issue on the sole ground that witnesses proffered lacked sufficient credibility to warrant a new trial. Those courts which have discussed this subject, have consistently affirmed that

> "the trial judge who approaches the question of the probable effect of the new evidence upon the result, in the event of a new trial, should be vested with a broad discretion in considering matters of credibility as well as of materiality. Stringent or artificial limitations upon the exercise of the discretionary power of the trial judge to grant new trials could only subvert the

purpose of the remedy." *Jones* v. *United States,* 279 F. 2d 433, 463 (4th Cir., 1960).

See also, *United States* v. *Lewis,* 338 F. 2d 137 (6th Cir., 1964), cert. denied 380 U. S. 978; *United States* v. *Luxenberg,* 374 F.2d 241, 250-1 (6th Cir. 1967).

The lengthy post-trial record offering support, in depth, for Justice Culkin's findings concerning credibility, his decision should not be disturbed. The confirmations of these findings by the Appellate Division [Dagmar was "clearly not * * * a source that a jury would be expected to credit" (3967, A. App., 80a)], and the Court of Appeals (A. App., 53a-54a), fixes them irrevocably. Speaking for the Supreme Court in *United States* v. *Johnson,* 327 U. S. 106, 111-12 (1946), Mr. Justice BLACK observed:

> "But it is not the province of this Court or the circuit court of appeals to review orders granting or denying motions for a new trial when such review is sought on the alleged ground that the trial court made erroneous findings of fact [cits. om.]. While this appellate court might intervene when the findings of fact are wholly unsupported by the record, [cits. om.], it should never do so where it does not clearly appear that the findings are not supported by any evidence".
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> * * *
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> "While a defendant should be afforded the full benefit of this type of rectifying motion, courts should be on the alert to see that the privilege of its use is not abused. One of the most effective methods of preventing this abuse is for appellate courts to refrain from reviewing findings of fact which have evidence to support them. The circuit court of appeals was right in the first instance, when it declared that it did not

> sit to try de novo motions for a new trial" (327 U. S. at 113).

The principle espoused by the *Johnson* decision was recently codified [28 U.S.C. 2254(d)].

Nor is there any risk that limiting review rewards those prosecutors who have "suppressed or concealed or withheld material evidence until after trial" (petitioner's brief, p. 49). This is not a case where a defendant was improperly deprived of material evidence. As will be shown more fully below (*infra* at p. 22), petitioner was adequately apprised of Dagmar's existence and Dagmar's tale while the trial was yet under way, though concededly by sources other than the District Attorney's Office. In the case at bar, the judicial power to weigh credibility stems, in part, from the nature of the proceeding: a defense attempt to obtain a new trial by the tender of evidence that was previously known and ignored. There is no inherent right to a new jury trial where, as here, the convicted murderer simply proffers a new defense and moves for further consideration. The present claim of blackmail followed by panic is merely a substitution for the defense first presented to the triers of fact, where petitioner's position was built on feigned ignorance of the events surrounding the killing of Rubin Markowitz.

Beyond these considerations, it should be observed that Dagmar's story does not relate directly to the issue of the petitioner's guilt or innocence. At most, it pricks Mrs. Lazarus' believability on a peripheral issue: her denial that she telephoned Dagmar. "Dagmar's testimony did not bear directly upon the guilt or punishment of Fein.

At most, it pertained to Gloria's credibility, provided one could bridge the gap of Dagmar's incredibility" (Bartels, J., A. App. 12a; see also 14a). Or, as Judge PALMIERI observed, the testimony "relates to the case in only an oblique way, going to Gloria's credibility. * * * It does not bear on the guilt or innocence of the petitioner. It does not exculpate the accused as did the evidence in the cases just discussed [*Brady* v. *Maryland*, 373 U. S. 83 (1963); *Barbee* v. *Warden, Maryland Penitentiary*, 331 F. 2d 842 (4th Cir. 1964); *Application of Kapatos*, 208 F. Supp. 883 (S.D.N.Y. 1962), quoted with approval in *United States ex rel. Meers* v. *Wilkins*, 326 F. 2d 135, 139-40 (2d Cir. 1964)]" (A. App., 32a). See also the opinion of KEATING, J., A. App., 54a.

Therefore, Dagmar's testimony is not grounds for a new trial. In an opinion that has remained unimpeached for over half a century, the New York Court of Appeals wrote, in *People* v. *Eng Hing and Lee Dock*, 212 N. Y. 373, 386 (1914):

> "The obvious purpose of the motion was to discredit the testimony of the two women * * *. This court has said (per Martin, J.) that a motion for a new trial should not be granted if the evidence is 'merely impeaching or contradicting the former evidence' (cits. om.)" [212 N. Y. at pp. 392-3].

See also *People* v. *Becker*, 215 N. Y. 126 (1915); *United States* v. *Hiss*, 107 F. Supp. 128, 136 (S. D. N. Y., 1952), aff'd 201 F. 2d 372 (2d Cir. 1953), *cert. denied sub nom. Hiss* v. *United States*, 345 U. S. 942 (1953); *United States* v. *Switzer*, 252 F. 2d 139, 146 (2d Cir. 1958).

In an effort to prove that Dagmar Generazio's story is exculpatory, petitioner now claims that he was the vic-

tim of an "extortion and blackmail scheme * * * obviously plotted" by Mrs. Lazarus (180B; brief, p. 12). His failure to tender this defense earlier apparently has its dual source in his being "not overly concerned as the date of his trial approached" and counsel's advice that he need not testify (179B; A. Br. to Appellate Division, p. 205). Be that as it may, new trials will not be granted solely to permit new defenses.

Moreover, even if Mrs. Lazarus did telephone Dagmar for a car to move a box, this would in no reasonable way tend to disprove petitioner's murderous deed. The outlandish "blackmail" theory suggested is not even supported, much less proved by the testimony offered. Such a telephone call does not eradicate the petitioner's complicity in the murder, nor does it transform Mrs. Lazarus into the engineer of an extortion plot directed at him.

If the call came at 6:00 p.m., the earliest hour at which Dagmar's equivocal pre-trial account ever fixed it, it would be completely consistent with the prosecution's theory, though possibly contradicting Mrs. Lazarus' trial testimony (1345-6). If the call came shortly after 3:00 p.m., as is presently claimed, at the most it might also tend to inculpate her as having had advance knowledge of the murder plan. But no reasonable inference from this fact exonerates the petitioner.

Moreover, the challenged testimony of Mrs. Lazarus related to an issue totally apart from guilt or innocence. And as the trial court observed, "suffice it to say that her character and reputation never were an issue" (3910, A. App., 95a; see also BARTELS, J., A. App., 12a; PALMIERI, J., A.

App., 32a; KEATING, J., A. App., 53a). The prosecution did not offer her as virtue incarnate, but rather as an eyewitness chosen by the defendant because she dwelt in "the depths that the defendant stooped to" (2120). The summation commended her not because she was beyond lying, but because she brought forth certain vital post-crime evidence. Indeed, little could be added to the clear and forceful manner in which the defense, throughout the trial, painted her untruthful instincts. It is apparent that the jury accepted material portions of her recital because they had the ring of truth, not because it had any illusions concerning the impeachability of her veracity.

Further, try though he may, there is no escaping the fact that the petitioner knew, while the trial was yet in progress, that a girl named Dagmar Finch had advised the district attorney that on October 10, 1963, Mrs. Lazarus had telephoned her in an attempt to borrow a car (3018-19). Aside from one passing attempt by a private investigator, Mr. Whelan, to obtain her mother's phone number from Detective Leman ["I didn't expect he would give it to me. In fact, he says, 'I'm not at liberty to give it to you' " (2930)]; not one member of the defense ever indicated to the prosecution that any difficulty existed in locating her. When petitioner asserts that during the trial "defense investigator [Whelan] * * * asked [Detective] Leman for her [Dagmar's] telephone number and address, so that the investigator could interview her (cits. om.)" (brief, p. 24), he misstates the record. As the New York Court of Appeals noted, "There was *no* request for the name, address or phone number of Dagmar nor any indication that the defense could not locate her" (A. App., 52a, n. 2) (emphasis in original).

The last the trial assistant knew was that Detective Leman had directed Mr. Whelan to Dagmar's mother in Baltimore, and that defense counsel referred to her during the cross-examination of Miss Boxer (765-6). Thus, the present case is clearly distinct from the many cases petitioner cites in support of his "affirmative disclosure" theory (brief, pp. 45-47). In each of them the defense was, at trial, unaware of the evidence it later submitted.

Petitioner now ignores his failure to ask the prosecutor for Dagmar's address, but in light of his knowledge of her existence and her story, that omission alone is fatal to his cause. Under these circumstances the requisite of diligence is statutory and immutable. See New York Code of Criminal Procedure §465 (7); *United States* v. *Costello*, 255 F. 2d 876, 880-1 (2d Cir. 1958); *United States* v. *Lombardozzi*, 343 F. 2d 127 (2 Cir. 1965). A special exception cannot be made in this case. (See opinion of Bartels, J. at A. App., 15a).

Failing to show a deprivation of material exculpatory evidence, the petitioner attempts to transform his contention into a claim of prosecutorial connivance at the use of perjury. The significance of this tack rests in the case law, for unlike the standards to be met before a second trial will be held on the ground of newly discovered evidence, the petitioner, in order to obtain another trial, need only show that the District Attorney failed to correct testimony he knew to be perjured. This follows even where the sole point goes to the credibility of that witness. New York's decisional law, including the case at bar, is founded firmly upon this principle. The record, however, does not

support the charge that the prosecutor engaged in any such wrongdoing. Indeed, the perjury claimed is non-existent.

The petitioner specifically argues that the failure of the prosecutor to "correct" that testimony of Detective Leman and Mrs. Lazarus which omitted Dagmar's name when listing those present at the time of the second recantation, deprived him of a fair trial (brief, pp. 19-23). Petitioner adds that this error was compounded because the prosecutor failed to rectify the erroneous explanations given by these two witnesses as to the cause of Mrs. Lazarus' second recantation, and still further aggravated when he concealed the details of the confrontation between the two women. As noted above, the record will not support this indictment against the trial assistant.

At the trial, Mrs. Lazarus testified that on September 28, 1964, she saw Mr. Dermody; Detectives Lyons and Leman were also present (1392-3). She recalled no one else there (1393). Upon inquiry as to why she had recanted on that date, Mrs. Lazarus responded, "For the same reason" as in June ["I truly felt sorry for the defendant and felt that my testimony would be detrimental" (1428)]; "The idea of coming here and saying these things that might hurt this man was against all my principles" (1429).

At trial, Detective Leman also omitted Dagmar's name from the list of those present at the second recantation (1635-7). When the moment arrived where Mrs. Lazarus directed him to leave the room, Detective Leman told the jury, "she accused me of questioning friends of hers, and being a—she accused me of being a Gestapo agent" (1666).

At the post-trial hearing, Mr. Dermody testified that when the two women confronted each other, Mrs. Lazarus "started to yell, and she accused Detective Leman of getting people to say things that weren't true about her" (3362-3). Detective Leman then took Dagmar out of the room and at about the same time Mrs. Lazarus spoke by telephone with her lawyer (3363, 3497). Mrs. Lazarus

> "blamed Detective Leman for cooking these things up and having these witnesses tell these stories" (3501).
>
> "She was mad at Leman. She accused Leman of trumping up this story, getting Dagmar to trump up this story about her; and out of spite to Leman, she told us she wouldn't testify and said that Fein never said it" (3507).

* * *

> "Q. According to your testimony, Mr. Dermody, when Dagmar confronted Gloria and gave her statement that you say she gave to you, it was after that that you say that Gloria changed her mind and said she had lied about what she told you?
>
> "A. But sometime after. This was not a spontaneous exclamation on her part.
>
> "Q. Sometime the same day?
>
> "A. That same day, but later on.
>
> "Q. And later on—how long? It was while Dagmar was still in the room, was it not, sir?
>
> "A. No, it was not.
>
> "Q. It was afterwards?
>
> "A. Yes. Dagmar, as far as I can—certainly she wasn't in the room.
>
> "Q. All right.
>
> "A. Well, I can't swear that Dagmar had already left the building" (3508-9).

At the post-trial hearing Detective Leman testified, in response to specific questioning, that on September 28, Mrs. Lazarus "just exploded" upon hearing Dagmar's account of the telephone call (2326). As he recollected, Dagmar left the room before Mrs. Lazarus (2328). He also departed, although he does not indicate when, and was not present when Mrs. Lazarus actually changed her story (2328-9).

The evidence is undisputed that Mrs. Lazarus "exploded" upon being confronted by Dagmar's story, but did not recant until sometime later. When she did recant Dagmar was not present, nor was Detective Leman. Indeed, he seems to have escorted Dagmar out, returned, and then been directed out later at Mrs. Lazarus' insistence. Thus, the police officer was accurate in omitting Dagmar's name from those present at that time (1638). She was not there. Mr. Dermody's description that "She was mad at Leman," "accused Leman of trumping up this story, getting Dagmar to trump up this story * * * out of spite to Leman she told us she wouldn't testify," in no way conflicts with the detective's account at trial; "she accused me of questioning friends of hers * * * of being a Gestapo agent." (If this prosecution witness was conspiring to conceal by committing perjury, certainly he would not have volunteered this provocative item to defense counsel at trial.) The post-trial examination was simply developed at greater length and with greater specificity.

The brief examination covering the persons present with Mrs. Lazarus when she recanted lacked the scope

which petitioner now alleges. As the Appellate Division succinctly concluded, "who was present at the interview was not emphasized and received only cursory attention" (3969, A. App., 82a). The specific questions certainly did not cover all the people Mrs. Lazarus met during her entire visit on September 28th. And yet, without such a broad scope, it is difficult to see how she, or the trial assistant, could be aware that the answer given might be construed as inaccurate at a later date. Its very ambiguity left it to the listener to interpret. Thus, while the petitioner may presently insist that the question covered only one point of concern, the contrary can just as reasonably be argued. Indeed, Mrs. Lazarus' omission of Dagmar's name from among those present at the moment of recantation was an accurate account. (See also opinions of STEUER, J., 3968, A. App., 81a; and Bartels, J., A. App., 11a.)

Petitioner now urges that Detective Leman must have been testifying about the earlier meeting when Dagmar was present and not the moment of recantation, because he was not there at that later hour (brief, p. 21). But the premise of petitioner's argument exposes the invalidity of his conclusion. When Detective Leman later learned of Mrs. Lazarus' change of story, he obviously surmised who was still present. Certainly he knew that Dagmar was not; he had previously escorted her out. Thus, he spoke with accuracy in listing those present at the time of recantation.

The record repeatedly demonstrates that the trial assistant was continuously on guard that the events should be fully and accurately presented to the jury. In an unusu-

al aside, Judge KEATING, speaking for the New York Court of Appeals, lauded the prosecutor for his "strong sense of fairness" (A. App., 52a). The prosecutor voluntarily disclosed the pretrial recantation, for the benefit of the defense; and at least twice during Mrs. Lazarus' testimony he called the court's, and the petitioner's attention to inaccuracies, once in connection with her denial of having seen certain grand jury minutes (1414-15), and again in relation to the disposition of criminal charges she yet faced (1421-3).

Despite petitioner's appellation of the cause of recantation as a "fact" (brief, p. 22), why Mrs. Lazarus temporarily altered her account is plainly not subject to objective analysis alone. Detective Leman's interpretation of her act differed from Mrs. Lazarus' explanation. Perhaps both were correct. Of paramount importance is that each explanation was before the jury, as was, of course, the act of recantation itself. But surely it cannot be held against the prosecutor because he failed to tender his subjective understanding of why Mrs. Lazarus did something, an understanding which, incidentally, coincided with that previously offered by Detective Leman at trial.

While the cause for Mrs. Lazarus' recantation appeared twofold at trial, the record will not support petitioner's present attribution of motive for recantation to the confrontation with Dagmar (brief, p. 22). To conclude so is sheer speculation. The argument he builds therefrom —that it was constitutional error not to give the details of that meeting—must fall, as it is without foundation.

POINT II

There was no prosecutorial suppression of Sandra Ede's "evidence" [answering petitioner's brief, pp. 27-30, 45-50].

The petitioner also offered Sandra Ede as the basis for a new trial. She was the prostitute who took messages for her friend Mrs. Lazarus at the latter's apartment and was present when the petitioner called seeking help in the late afternoon of October 10, 1963 (1133-34). After Mrs. Lazarus had responded to that call and departed, Miss Boxer arrived at Mrs. Lazarus' building, pursuant to their prearranged rendezvous (705-6). Upon conversing on the lobby intercom with Miss Ede, Miss Boxer went to the "Weissman" apartment at 406 East 63rd Street (708-9). There she helped the petitioner attempt to conceal the murder.

Near the conclusion of the People's case the prosecutor observed that when Miss Ede had been questioned at the District Attorney's Office, she

> "claimed to have had no recollection of the events that allegedly transpired on October the 10th.
>
> "It is for that reason that the People did not call her as a witness. However, I want to furnish counsel with the name, full name of this person, and her address for their benefit, so that they can do whatever they want with it.
>
> "The name of the woman is Sandra Ede—E-d-ē. She resides at 2575 Palisade Avenue, Riverdale, New York" (1747).

The petitioner contends that this statement was "disingenuous," that Miss Ede had in fact given the prosecutor a different, and exculpatory, account indicating that although she had no recollection about October 10, 1963, she never gave any message over the intercom (brief, p. 28). As is shown below, this contention is factually wrong, and even on its own terms this is merely a collateral point, magnified out of all proportion to its significance in the case.

Eschewing restraint, and ignoring recorded facts, the petitioner in moving for a new trial also charged that the prosecution met "repeatedly" with Miss Ede and "pressed her * * * to lie for them" (31 B-32 B). Unsuccessful, the prosecution then transcribed a statement, and "The police and prosecutor hounded her until her health broke and she was institutionalized" (32B). Petitioner concluded that the "ploy" of giving the defense her name and address was "doubly misleading"; the substance of her story was misrepresented and "previous defense counsel could not even contact Sandra, at the time, because she was under psychiatric care in a hospital" (33 B).

Miss Ede herself refuted most of these vicious charges, and all of the credible, material, and relevant evidence establishes both the lack of merit to her second story and the absolute propriety of the trial assistant's behavior.

After hearing Miss Ede, and Messrs. Leman, Dermody and the late Alexander Herman (then Chief of the District Attorney's Homicide Bureau who interviewed Miss Ede prior to trial), the trial court wrote:

> "In court she [Miss Ede] indicated, although with some ambiguity, that it was her practice not to speak

to anyone over the intercom, and it is clearly this general procedure that she refers to in the questions and answers. But it is equally certain that this witness, who was exceptionally anxious not to be a witness—either at the trial or at the hearing—consistently advised all of the representatives of the prosecution repeatedly she could not recollect 'one way or the other' the events of October 10, 1963, or any other day during that period, with respect to her participation in a conversation over the intercom with Geri Boxer. Faced with a witness of now proven instability whom he had every reason to believe was withholding information helpful to his case, the prosecutor acted appropriately when he advised the defense of her name and address. He was under no obligation to volunteer her entire story and defendant's prayer for that proposition is rejected as unprecedented. It is also considered significant that the defendant was not only aware of Miss Ede, but interrogated Miss Boxer at the trial as to whether Miss Ede did not have a different recollection than Miss Boxer's. Miss Ede herself supports Miss Boxer's answer which was 'she said she didn't remember.' It is further certain that the statements by defendant's attorney concerning the inaccessibility of Miss Ede, at the time her name was tendered by Mr. Dermody at trial, are inaccurate. She was available as a witness past the time the defense rested, and the conclusion that the defense consciously rejected the idea of speaking with her is irresistible and is supported by their refusal to obtain an affidavit from Mr. Kleinman [trial counsel] on this subject, in spite of this court's express request. Similarly, it is plain that the defendant's charges that the prosecution harassed Miss Ede until she was driven to a mental institution is without one scintilla of proof. Miss Ede denied ever making such a charge'' (3906-7, A. App., 92a-93a).

In this proceeding, the gravamen of petitioner's contention revolves about Miss Ede's post-trial assertion that

she never gave messages over the intercom. Mr. Dermody flatly denied ever being so advised (3375), as did Detective Leman (2411, 2422-3) and Mr. Herman (3288).

In arguing that the Appellate Division expressly "found" that Miss Ede had told the prosecution of not passing on the message, petitioner misinterprets that opinion (brief, p. 30). The only judicial "findings" in the record are those of Judge Culkin, quoted in part on the preceding two pages. When the appellate court writes, "On the motion for a new trial it was established that," the word "motion" must be defined as limited to the pre-hearing papers. Twice elsewhere in the Appellate Division opinion, the word "motion" is used in this narrower, but nonetheless proper, sense (see footnotes at 3958, A. App., 71a; 3963, A. App., 76a). Where there is sufficient in the record to support the trial court's findings, it cannot be assumed, as petitioner does, that they were overruled *sub silentio*. The main thrust of Mr. Justice Steuer's opinion is that, on the basis of the affidavits presented, no hearing was warranted on the Ede matter. Thus, the court writes, "whether or not" the claimed matter was disclosed by the prosecutor, the defense already knew about her and therefore the "contention of concealment was not proved" (3963, A. App., 76a). In adopting the broader definition of the word "motion," petitioner is left with a structural contradiction which he ignores here, and in the state courts could only explain away as "egregious error" (A. brief to N.Y. Ct. of Ap., p. 36); in limiting the definition the inherent logic of the opinion follows throughout. Plainly the narrower interpretation is the one to be selected, as was done by the New York Court of Appeals (A. App., 45a).

The trial assistant was faced with a witness who had every reason to know whether or not she had a role in the singular whirl of events which followed the petitioner's request for help, but who steadfastly equivocated. She would neither affirm nor deny, repeating endlessly, "I don't remember."

In an effort to ascertain the truth, the prosecutor confronted Miss Ede with Miss Boxer's account. As Miss Ede herself recounted, her response to Miss Boxer was, "I don't remember any of these things, you know, but I don't want to call you a liar * * * I don't know" (3201). [See also Miss Boxer's (782-3) and Mr. Dermody's accounts (3378) of this confrontation.]

The trial assistant also ascertained that a telephone had been installed in Miss Ede's Riverdale apartment on October 10, 1963, and so advised her. Despite this fixed incident, Miss Ede still could shed no light. She asserted the truism that she could not be in two places at the same time, but refused to deny, or admit, that she conveyed a message for Mrs. Lazarus on that date (3164-5).

Miss Ede was confronted with Mrs. Lazarus. Still she "could not remember one way or the other" (2402).

In addition, as she twice admitted, Dagmar also placed Miss Ede in Mrs. Lazarus' apartment before 4:00 p.m. on the afternoon in question (2662, 2669). But Miss Ede still claimed insufficient memory. It should never be forgotten that, throughout, the trial assistant was confronted with a witness whose instability was apparent, and ultimately confirmed medically.

In the light of these circumstances, choosing not to call Miss Ede to the stand cannot be faulted. No higher standard could be demanded than that exhibited in the investigation of her story. She had nothing to add to the case. The offer of her name and address, though perhaps unnecessary in view of the petitioner's knowledge of Miss Ede and the details of her conversations in the District Attorney's Office (780, 782-4, 786, 808), was fairly and timely made.

Moreover, the credible evidence shows that the appellant was not misled by the prosecutor's statement. As pointed out by the four courts which have discussed the merits of petitioner's claim (A. App., 28a, 45a, 76a, 92a), the defense knew about Miss Ede, and questioned Miss Boxer about her before and during the trial. Petitioner is precluded from offering her as a witness now when he rejected the same opportunity at trial.

POINT III

There was no prosecutorial suppression of the "evidence" offered by Mrs. McNair and Mrs. Bennett [answering petitioner's brief, pp. 30-32, 45-50].

At the hearing on his motion, the petitioner produced two witnesses, residents of the East 63rd Street building where the murder occurred. These women, Mrs. McNair and Mrs. Bennett, testified that they recalled hearing four gunshots coming from a direction opposite from the petitioner's apartment (2827-9, 3071-3, 3091-2). On the basis of this testimony and the failure of the People to volunteer

them as witnesses at trial, the petitioner claims he is entitled to a new trial.

This claim was properly rejected by the courts below. First, the defense not only knew of the existence of the witnesses, but had unusually good access to them since one of the women, Mrs. Bennett, was a social acquaintance of one of the petitioner's attorneys, Mr. Kassow (2837, 2846, 2888-90, 2894, 2959, 2970, 2973-4, 2977-8, 2981, 2984, 2989). Second, the pre-trial account given by the witnesses to the prosecutor, far from being the material exculpatory evidence now alleged, was in fact strongly inculpatory and wholly consistent with the People's theory of the case (2344, 2387-8, 2395-8, 3365-7, 3370). The only evidence found credible is that the witnesses repeatedly told Mr. Dermody and detectives that they heard shots coming from above them and toward the front of the building, the direction of the petitioner's flat (*ibid.*). The witnesses also told the prosecutor that they had disclosed to the defense their recollection as given to the prosecutor (3368, 3371, 3414). Finally, the reliability of these witnesses and the accuracy of their perception and recollection was seriously undermined. Their ability to identify the sounds they heard as gunshots, their changing accounts, and the implausibility of their other claims all led the trial court to conclude that they were "completely confused." Stating the reasons for this conclusion fully, the court wrote:

> "The defendant offered the testimony of mother and daughter, neighbors of his, Mrs. McNair and Mrs. Bennett, as proof that the shots came from a direction other than the defendant's 63rd Street apartment. Taking their credible testimony in the most favorable

light, each testified that some time in late September or early October 1963, they heard four to six loud noises which came through their living room window (an exposure which faced the rear of the building as opposed to the defendant's dwelling which was in front and two floors higher) late in the afternoon. I find no basis for believing that they recognized the sounds as gunshots, partly because Mrs. Bennett long ago denied hearing shots when questioned by the defendant's first attorney of record, Mr. Kassow, and partly because of their lack of expertise. Mrs. Bennett's recollection that she only discussed having seen a large steamer trunk in the lobby of the building during the same period—but not the 'shots' because of the trial assistant's request that she not discuss it with anyone, is completely inconsistent with her demeanor at the hearing. This voluble witness was simply incapable of restricting her desire to talk. Coupling the testimony of these witnesses with the information they gave to Mr. Dermody and Detective Leman (that the shots came from up above and towards the front of the building—and that Mr. Kassow had been so advised), the only reasonable conclusion is that they are completely confused. They misdated their conversation with Detective Leman by several months, failed to remember their description of the trunk from one week to the next, and as noted above inaccurately recounted the nature of the information they passed on to Mr. Kassow. That they may have told the prosecutor an entirely different story than what they presently recollect is so reasonable that it is the only probable explanation. The prosecutor, having been advised by the witnesses that the defendant's attorney had already been informed of matter which would tend to inculpate the defendant, could not be expected to come forward with the pointless task of repeating that information" (3904-05; A. App., 90a-91a).

Once the credibility of Mrs. McNair and Mrs. Bennett have been found wanting—and it is a preposterous story they tell—the refusal of the trial assistant to call them as witnesses is beyond fault. See opinions of Appellate Division at pp. 3964, 3967, A. App., 77a, 80a; and of the New York Court of Appeals, 46a-47a. Indeed, the decision is repeated by the defense. It is conceded that the petitioner knew that these women were witnesses to the very important presence of the trunk in the building. One can only surmise what appraisal of their yarn was made when Mr. Kassow, the attorney of record, conferred with trial counsel, Messrs. Blinder and Kleinman. The result of that colloquy is a known fact. The women were never even sought for questioning.

In sum, great violence would be done to the concept of prosecutorial suppression if a situation such as this one were deemed cognizable thereunder. The defense decision not to pursue known witnesses is a binding one, for the sound order of criminal trials requires diligence on the part of defense at their first opportunity [N. Y. Code Crim. Proc. §465(7)] and not repeated trials to correct possible omissions or errors of defense judgment.

POINT IV

The prosecution cannot be cited for an interference with petitioner's constitutional rights owing to his failure to examine a report he subpoenaed; in any event, there was no prejudice [answering petitioner's brief, pp. 32-33, 45-50].

Petitioner contends that a "fourth instance of suppression occurred when the prosecution failed to make known to the defense, Detective James E. Kelly's ballistics report" (brief, p. 32). He misconstrues the prosecutor's obligation. However, before even reaching the substance of his claim, petitioner faces a procedural hurdle of fundamental importance. While this identical claim was raised in the state courts and appealed to the United States Supreme Court, it did not appear in the District Court. Petitioner included this point in his appeal to the court below (Appellant's brief to the U.S. Ct. of Ap., pp. 19-20), but that court did not discuss it. Respondent's brief to the United States Court of Appeals (Respondent's brief, p. 34) noted that, "It is difficult to understand how appellant can include this point among the errors he charges to Judge Palmieri when he did not present it to Judge Palmieri." Since the court below was in no position to review this issue, it is submitted that the petitioner cannot properly raise it on this certiorari petition.

Detective Kelly's report (150B) was subpoenaed by the defense, at the outset of trial, and was in the physical possession of the court during the trial (3904, A. App., 89a; see also opinion of N.Y. Ct. of Ap., A. App., 45a). Petitioner's contention that he did not have access to any of

the reports in court pursuant to a general defense subpoena, unless he specifically identified the desired report (brief, p. 33), simply does not accord with the trial court's practice. There were no such limiting rules set forth, nor are there any cited. Indeed, there were numerous occasions when a general request by defense counsel brought forth all documents related to a witness' testimony (*e.g.*, 1553-7). As the trial judge noted, the Kelly report was "his to utilize as he saw fit. His choice having been made, he is bound by it" (3904, A. App., 89a; see also A. App., 45a).

In any event, the contents of Detective Kelly's report amounted to a cipher. He probed the hole in the floor of apartment 5-B "for ballistics evidence without results" (150 B). Confirming the plain meaning of this language, he later observed in an affidavit, "This specifically means that I did not find a spent bullet or any fragments which could be identified as coming from a bullet. Due to the condition of the hole I cannot say one way or the other whether the hole in its original state was caused by the entrance of a bullet" (517 B). In other words it was "an inconclusive naked eye examination" (A. App., 45a). Following this inspection, the floor boards were sent to the police laboratory. There, Detective O'Brien examined the area through a microscope and discerned "three minute fragments of metallic residue" (1724). This, of course, in no way conflicted with Detective Kelly's inability to discover the same with his naked eye. Rather, it "fully superseded" the Kelly test (A. App., 45a).

The defendant does not claim that he was deprived of Detective O'Brien's laboratory report.

POINT V

Denial of petitioner's pre-trial motion for inspection of bullets did not contravene his constitutional safeguards; moreover, no prejudice was or can be shown [answering petitioner's brief, pp. 33-34, 50-53].

While neither the Constitution of the United States nor the statutes of New York State command a pre-trial right to discovery and inspection, New York case law has taken cognizance of this right where required by the "exigencies of defense." *People* v. *Golly,* 43 Misc. 2d 122, 123, 250 N. Y. S. 2d 210, 213 (Sup. Ct., N. Y. Co., 1964). Cf. *United States* v. *Garsson,* 291 F. 646, 649 (S. D. N. Y. 1923); *United States ex rel. Bund* v. *LaVallee,* 344 F.2d 313 (2d Cir. 1965), *cert. denied* 382 U. S. 867. Far from presenting persuasive reasons for examination of the bullets in question prior to trial, the petitioner merely stated that they were "pertinent" (36A). Now, in a belated attempt to magnify the significance of his application, petitioner erroneously asserts that the denial of his pre-trial motion left him "in no position to assess Haase's [the prosecution's ballistics expert] testimony or to cross-examine him adequately" (brief, p. 34). Not only was Detective Haase cross-examined by the defense—without request for recess to permit further examination of the bullets—but his written reports on the subject were in court throughout the proceedings pursuant to petitioner's subpoena and, as the trial court observed, "were his to utilize as he saw fit" (3904, A. App., 89a).

Petitioner's present claim of prejudice therefore rests solely on his post-trial "tender [of] expert evidence that

Haase's testimony had been 'erroneous and misleading' " (brief, p. 34). From his analysis of the record, petitioner's expert concluded that the jury was misled into believing that "all four bullets were shot from a single firearm" (*ibid.*). But a full reading of the record rebuts any such conclusion. Indeed, when asked "What type of weapon would the bullets have been discharged from?" Detective Haase responded, "They would be capable of being discharged from various rifles or pistols with a right six rifling" (267). It is true that his characterization of "right six rifling[s]" on each of the four missiles conflicts with earlier testimony that only three bullets bore indicia of "right twist rifling" and only one, MD-4, "right six," but this conflict was before the jury. An analysis of earlier testimony clearly shows that Detective Haase found "six lands and grooves," or a right six rifling, on only one bullet (265). Petitioner's argument in the state courts that this caused utter confusion can be drawn entirely from the trial record, and was therefore, as the trial court noted, "open for cross-examination. Besides not agreeing with defendant's analysis of the testimony, its proffer is plainly untimely" (3904, A. App., 89a).

In sum, as Judge Palmieri succinctly concluded, petitioner "has pointed to nothing that would establish prejudice * * *" (A. App., 38a).

POINT VI

There was no violation of petitioner's Fourth Amendment rights by the seizure from another party of the chair which he had abandoned; further, his motion for a hearing was untimely, and his claim knowingly waived [answering petitioner's brief, pp. 34-37, 53-60].

During the direct examination of petitioner's friend, Mr. Tishman, the prosecution offered for identification a chair which had, on the day of the murder, been in the petitioner's "Weissman" apartment (588). At that time defense counsel stated:

> "If this furniture purports to be furniture that was in the apartment, Apartment 5B, which is the apartment in question over here; and if that apartment was entered into without a search warrant; or in the alternative, since we have already heard some furniture had been stored in some furniture storage warehouse, if this furniture had been secured from this furniture storage warehouse without the proper legal warrant or proper legal authorization, I object to it; and I shall move to suppress this evidence; and if necessary to hold a hearing if the facts are as I have suggested" (588-9).

It was then agreed, after a conference among counsel, that the chair would be marked for identification so long as the defense was not deemed to have waived its right to "raise the question of a warrantless seizure of this piece of furniture and to raise the question of the legality of the evidence in a motion to suppress later" (593). "Later" arrived in eight days, during the direct examination of Mrs.

Lazarus, on November 10, 1964, when the chair was offered in evidence (1192-3). The chair was received over a general objection and, contrary to petitioner's statement, without a refusal by the trial judge to conduct a hearing (brief, p. 59). There was simply no request for a hearing or *voir dire* (1193). Subsequently, petitioner's attorney noted:

> "Now, if your Honor pleases, I move to strike from the record the introduction of the chair into evidence.
>
> "The Court: Overruled.
>
> "Mr. Kleinman: May I without a discussion about it, call your Honor's attention to a discussion we had at the bench one time a few weeks ago?
>
> "The Court: Yes, I am familiar with that; but under the testimony here, the objection is overruled" (1194).

And this was clearly a proper ruling, for the evidence before the court left no alternative. Mrs. Lazarus had been instructed by the petitioner to remove all the furniture, including the chair, from the 63rd Street apartment. "Just get rid of it. I don't care what you do with it," he told her (1173). Mrs. Lazarus' solution was to hide the furniture in a warehouse she had dealt with in the past (1173-4, 1193). The method of disposal was her own; it was not pursuant to any instructions by petitioner.

Petitioner's assertion that the trial court "totally denied" him a hearing will find no support in the record (brief, p. 58). Once he agreed to postpone his exploration of the Fourth Amendment issue (593), never again during trial did he seek a special hearing. See also opinion of Bartels, J., A. App. 17a-18a.

From the foregoing, it is beyond serious dispute that the record supports the finding of the hearing court that

petitioner abandoned his title to and possession of the chair when he left it to Mrs. Lazarus to dispose of it as she would (A. App., 85a). When she placed it in the Century Moving & Storage Warehouse, her feminine reaction against destroying perfectly good property, petitioner retained no rights cognizable by the Fourth Amendment which could have been breached by the subsequent acquisition of the property by law enforcement authorities.

Mrs. Lazarus' testimony in this regard was never challenged by the petitioner. And the reason for his attorney's perfunctory objection is obvious. Defense counsel initially based his statement on an incomplete understanding of the facts relating to the seizure (588-9). The warrantless search of the warehouse took on an entirely different legal significance when it became clear that the petitioner had abandoned the chair. E.g. *Hester* v. *United States,* 265 U. S. 57 (1924); *Abel* v. *United States,* 362 U. S. 217 (1960); *People* v. *Robinson,* 15 N. Y. 2d 559 (1964); *United States* v. *Copeland,* 263 F. Supp. 976 (S.D.N.Y. 1967); *Application of Zerga,* 218 F. Supp. 759 (S.D.N.Y. 1963). The necessary conclusion was that the petitioner was in no position to complain for the furniture was no longer his, and, more important, Mrs. Lazarus had the right to turn it over to anyone at all, including law enforcement officers. Indeed, on the day she was finally picked up by the police, she was attempting to change the name of the bailor from Weissman to Williams, an attempt which was solely "her idea" (1643). See also opinions of Bartels, J., A. App. 19a; Palmieri, J. at A. App. 36a-37a; and Keating, J., A. App. 43a.

Petitioner's present chastisement of the trial court for not expressly stating its basis for denying the suppression motion is contrived. The conclusion that petitioner draws therefrom, that only with such judicial opinion could Mrs. Lazarus "have been fully cross-examined" (brief, p. 59), is astonishing. If he wanted, or needed, the "theory" for the court's ruling prior to cross-examination, he should have asked for it, or made his motion when it ought to have been made—before the trial commenced.

Further, the petitioner "has no standing to assert the violation of any constitutional rights as to this seizure" (PALMIERI, J.; A. App., 36a). See also opinion of Bartels, J. at A. App. 18a-19a.

Some years ago the Supreme Court described those persons who have standing to suppress evidence. It wrote:

> "In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been the victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else. *Jones* v. *United States,* 362 U. S. 257, 261 (1960).

Petitioner does not qualify. In his brief, he sets forth a number of citations, arguing that these cases reflect a split in the authorities on the requirements of standing, and urging that there is precedent which provides him with the necessary standing (brief, pp. 54-57). Examination of the cases he cites indicates little support for his contention. Indeed, *Alderman* v. *United States,* —— U.S. ——, 37 U.S.L. Week 4189, 4191 (March 10, 1969) is one of the

clearest statements yet of the principle that "* * * Fourth Amendment rights are personal rights which * * * may not be vicariously asserted."

The chair seized from the Century Moving and Storage Warehouse, was arguably

> "seized from another in violation of the Fourth Amendment. But we think there is a substantial difference for constitutional purposes between preventing the incrimination of a defendant through the very evidence illegally seized from him, and suppressing evidence on the motion of a party who cannot claim this predicate for exclusion. * * * We are not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth" (*id.* at pp. 4191-2).

Plainly, the chair was not taken from Mark Fein, nor from any site over which he exercised even a modicum of possessory right or right of privacy.

Finally, petitioner ignores the statutory barrier which sets forth New York's governing procedural requirements, but it is well nigh insurmountable. Discussing Section 813-d of the New York Code of Criminal Procedure, he points to certain protections that that statute affords (brief, p. 35). He fails, however, to mention the mandate which requires that a defendant make his motion to suppress only before trial commences unless he falls within one of several expressed exceptions, none of which applies here, or has been urged (compare Rule 41e of the Federal Rules of Criminal Procedure). The People's argument to this effect was

never rejected by the state courts (but see, A. App., 36a), nor answered by petitioner. No good reason why an exception to the orderly requirements of Section 813-d has ever been tendered by the ably assisted petitioner.

Petitioner also claims that certain facts suggesting that the chair was unlawfully seized are "not disputed" (brief, pp. 34-35). Of course they are. But this "dispute" is no longer an issue of concern to the courts. Counsel's failure to seek a hearing to suppress the evidence constitutes a complete and deliberate waiver. There cannot be the slightest doubt that this constitutional point, like so many others, is waivable. This is particularly so where, as here, the petitioner was represented by eminent and experienced attorneys who displayed complete familiarity with the liberal and frequently utilized procedures for litigating the issue in the *nisi prius* court. Under the circumstances, it is as fruitless as it is unnecessary to scan the record for probable cause or consent. The issue having been waived, there was no occasion for adducing whatever evidence there might be.

POINT VII

The selection of a jury from a special panel was not in contravention of petitioner's constitutional rights [answering petitioner's brief, pp. 37-40, 60-72].

Petitioner argues that "New York's blue ribbon jury statute [former section 749-aa of the New York Judiciary Law, repealed in 1965] * * * violates the Sixth and Fourteenth Amendments" (brief, p. 60). His argument is not directed at the sentencing, for the court alone considered the question of sentence. Rather, the petitioner is seek-

ing to have his conviction set aside because "everybody in New York but the courts recognized that blue ribbon juries were not impartial" (brief, p. 66).

Meaningful support for this assertion is lacking. Indeed, the most telling refutation of his thesis comes from the affidavit of his own trial counsel opposing the motion for the special panel:

> "The qualifications of a member of a special panel and that of a member of a regular panel are the same other than the former must entertain a belief in capital punishment while the latter need not.
>
> • • •
>
> "Since ordinary jurors and special panel jurors have the same qualifications, there is no reason for any delay. One question to the assembled panel of ordinary jurors would dispose of any who had conscientious scruples against capital punishment" (174A).

Further, the only pertinent comment pertaining to the question of prejudice that can be gleaned from the studies petitioner cites also rejects the conclusion that blue ribbon juries are proven biased. Thus, the 1952 Judicial Council report observes "there are no adequate facts that prove that the special jury is a convicting jury since it cannot be assumed that a banker is more 'prejudiced' against a person accused of murder than a plumber, or that males are more prone to convict than females, or that the more educated are so inclined to a greater extent than the less educated * * *" (A. App., 102a-103a). See also *Witherspoon* v. *Illinois*, 391 U.S. 510, 517-518 (1968), and *Bumper* v. *North Carolina*, 391 U.S. 543, 545 (1968).

In an attempt to by-pass the well-defined reach of the *Bumper* and *Witherspoon* decisions, petitioner asserts that excluding those with scruples against capital punishment is a "systematic exclusion of [a] recognizable, identifiable group" forbidden by the Sixth Amendment (brief, p. 61). There are two problems with his argument.

First, never for Sixth Amendment purposes has "identifiable group" been so sweepingly defined by this Court as petitioner proposes to do. He might just as relevantly argue that a prosecution's exclusion of all veniremen who cannot partake in a lengthy trial is an unconstitutional exclusion of a "recognizable, identifiable group". But surely, not every conceivable grouping of individuals is subject to the Sixth Amendment reach petitioner would here assert. The rulings he cites (brief, pp. 61-62) invariably emanate from the exclusion of such precisely defined aggregations as women, wage-earners or Negroes. Moreover, were he correct, there would have been no basis for this Court to have refused to reverse Mr. Bumper's conviction on the initial ground it considered: violation of Sixth and Fourteenth Amendment right to trial by impartial jury. *Bumper* v. *North Carolina* (*supra*), 391 U.S. at 545. For partiality would never have to be shown, the mere act of excluding being sufficient to cause reversal.

Yet in the companion case, *Witherspoon* v. *Illinois* (*supra*), this Court repeatedly emphasized that left open was the question of excluding those veniremen who "would *automatically* vote against the imposition of capital punishment" (391 U.S. 522-523, n. 21; *id.* at 520) [emphasis in original]. Plainly, those who would automatically vote

against the imposition of the death penalty are an "identifiable group" under petitioner's definition and would therefore have to be included in capital case juries—automatically. Thus, his argument and the Court's approach to the problem in *Bumper* and *Witherspoon* are mutually exclusive.

Secondly, in order for petitioner to prevail, he must persuade that retroactive application for his far-reaching contention is in order. He is here on a denial of habeas corpus. The guidelines evolved by this Court in a series of cases beginning with *Linkletter* v. *Walker,* 381 U.S. 618 (1965) and summarized in *Stovall* v. *Denno,* 388 U.S. 293, 297 (1967) compel rejection of a retroactive application of the rule petitioner seeks. Combining an absence of proof that special juries are improperly partial with the fact that New York has repealed the statute in question, adding the understandable reliance courts have in the past placed on this Court's unequivocal precedents, and topping it off with the broad effect that retroactive application would have on the administration of justice, in cases where the death sentence was not imposed, the rule petitioner calls for must be rejected in this case.

POINT VIII

The court's preliminary instructions to the jury, given before any testimony was heard, violated no fundamental rights of petitioner; the charge was similarly free of error [answering petitioner's brief, pp. 41-42, 71-72].

Petitioner charges that the trial court "impaired the petitioner's privilege against self-incrimination" by "misinform[ing] the jury" of his constitutional right to remain silent (brief, p. 41). His contention is without merit.

Petitioner's argument is directed at two distinct parts of the trial: comments by the trial judge prior to the openings and presentation of evidence; and a section of the court's final charge to the jury. Petitioner's arguments will be dealt with in that order.

When, after a week of *voir dire,* the jury was finally selected, the trial court briefly set forth a series of instructions. Included was the warning,

> "In civil cases whichever side produces the preponderence of evidence, that is the side that prevails. When you get to the trial in a civil case and the defendant does not open his mouth, does not come forward to defend himself, he has to lose the case. That is civil law. But there is no such thing in criminal law. As has been told to you here, and I will tell it to you again, a person accused of crime does not have to do anything. This is a fundamental principle of the law in this case and any case in this land. A person accused of crime is presumed to be innocent at all times until a jury finds him otherwise. Those are not just words. If

you don't believe that now, gentlemen, you have no business sitting on the jury. That is the law. You don't have to like it or agree with it, but you have to follow it. And that is the law of this case and every case. Therefore, that being the law, there is no burden upon the person accused of a crime of doing anything but presenting himself in court. That he must do.

"If a person accused of crime wishes to testify he has the privilege to do so. That he may exercise. He does not have to. And it may not be commented upon at any time if he does not do so. He may produce witnesses and he may not. So in the ordinary course of events the People, having made certain accusations in writing, the burden is upon the People to prove their case" (60-1).

The petitioner excerpts from these remarks and asserts that an "adverse inference" may be drawn concerning defendant's failure to testify (brief, p. 42). The fallacy is that he misconstrues plain language. These introductory remarks, before the opening addresses, simply directed the jury's attention to the rules of the proceeding about to commence. Although instructions to a jury before the evidence is adduced is not statutorily mandated, such a procedure is sound where the court has every reason to believe that the proof will be extensive and complicated. It serves the valuable function of assisting the jury in properly evaluating the testimony to come. The advance warning to the jury to disregard a defendant's failure to produce witnesses or testify was especially helpful to him in the instant case where a normal jury might have otherwise expected, and awaited throughout the trial, the defendant's "side of it." It is therefore remarkable that the petitioner now asserts prejudice in the court's preliminary admoni-

tion. The more so when it is noted that there was objection neither to it nor to that section of the court's charge of which petitioner now complains (2179; brief, pp. 41-2) (see also 2177, 2180). Understandably so, since the charge was a proper statement of petitioner's rights (*ibid.*).

Not in any proceeding prior to today has petitioner challenged the charge. In the Appellate Division and the Court of Appeals in New York, petitioner focused solely on the trial judge's comments to the jury prior to adduction of evidence (Appellant's brief to App. Div., pp. 159-164; Appellant's reply brief to App. Div., pp. 35-36; Appellant's brief to N.Y. Ct. of Ap., pp. 73-77). In each of these courts respondent pointed out that no criticism of the trial court's charge was being raised (Respondent's brief to App. Div., p. 89; Respondent's brief to N.Y. Ct. of Ap., p. 82). In neither of his motions to amend the New York Court of Appeals' remittitur did petitioner challenge the charge; nor, for that matter did he complain against it when he appealed and in the alternative applied for certiorari to this Court, or later when he sought a rehearing before this Court (Appellant's briefs to U.S. Supreme Court, October Term, 1966, No. 793). Indeed, his prior applications to this Court made no mention of any of the trial court's instructions.

In the District Court, the petitioner did not complain of any of the trial court's pre- or post-evidentiary instructions in his application for habeas corpus. However, following Judge PALMIERI's denial of the writ, petitioner, during oral argument in support of his motion for a certificate of probable cause pursuant to 28 U.S.C. 2253, did raise the question of the trial court's opening remarks.

In granting the certificate, Judge PALMIERI tersely dismissed petitioner's limited attack on the trial court's opening comments (A. App., 40a). In the United States Court of Appeals, petitioner renewed the argument he had pressed orally on his application for a probable cause certificate (Appellant's brief to the U.S. Ct. of Ap., pp. 44-47). Respondent, in opposing, again pointed out that the complaint was not against any portion of the charge (Respondent's brief to the U.S. Ct. of Ap., p. 43). And during oral argument in the court below, petitioner appeared to concede not only that he was not challenging the trial court's charge, but that his opportunity to do so had been irrevocably waived:

> "Judge Feinberg: Before you get to that, the D.A. says the Judge said this in his final charge to the jury and that no one objected.
>
> "Mr. Rogge: There was not an objection. I don't think this can be cured. You are right. There wasn't an objection." (Excerpted from p. 46 of minutes of oral argument submitted to the United States Court of Appeals by petitioner at the court's request.)

With this somewhat lengthy procedural history in mind, it is difficult to understand how the petitioner can now challenge the charge.

The petitioner also argues that because federal judges may not call attention to the defendant's silence if the defendant has not requested such an instruction (brief, pp. 71-72), the state courts are similarly bound not to admonish the jury. He reasons that the federal prohibition is constitutional and made applicable to the states by *Griffin* v. *California,* 380 U. S. 609 (1965), and *Malloy* v. *Hogan,*

378 U. S. 1 (1964), asserting that the latter case "overruled" *Adamson* v. *California,* 332 U. S. 46 (1947) and *Twining* v. *New Jersey,* 211 U. S. 78 (1908) (brief, p. 71). He is wrong on both counts, for the cited cases do not stand for the sweeping principle he urges and, in any event, the federal standard is set forth by statute, and has never assumed constitutional magnitude. See Act of March 16, 1878, 20 Stat. 30, now 28 U. S. Code §632; see also, *Bruno* v. *United States,* 308 U. S. 287, 292 (1939). The charge concerning the petitioner's silence was succinct and respectful of his rights. In every way it met with the petitioner's suggested standard (brief, p. 72).

POINT IX

Publicity did not interfere with petitioner's right to a fair trial [answering petitioner's brief, pp. 42-44, 73-74].

Petitioner also contends that "the police launched an avalanche of charges, information and misinformation to the press which had the effect of * * * vitiating his right to a fair trial" (brief, p. 42). The record lends no substantiation to this argument.

Despite the publicity that attended the arrest and arraignment of the petitioner in the winter of early 1964, there is not one scintilla of proof tending to show that it interfered with his right to an impartial trial. The conflict that sometimes arises between a defendant's right to a fair trial and the Fourth Estate's right to publish is a genuinely troublesome one. But peaceful co-existence—demanded by the Constitution—is impossible when it is

claimed, as here, that the mere occurrence of unfavorable publicity strips an accused of his constitutional safeguard.

While petitioner now ignores the manner in which he protected himself against preconceived opinions, it is a matter of record that for many months prior to trial he was alert to the problem. He sought and obtained continuances from time to time expressly to postpone trial until the newspaper accounts would be forgotten (61A). Then, in June, 1964, by habeas corpus petition, appellant moved for an immediate trial, and at the subsequent hearing his counsel referred to the publicity "at the time of arraignment or shortly thereafter, of the fact that it would be impossible then to receive a fair trial. I suppose everybody in this courtroom read the newspapers at that time. But time has passed since then. We are willing to go to trial now" (147A). Nor did the petitioner change his position four months later when the trial finally commenced even though he had been free on bail since July of that year (161A-162A,.4-7). Thus, petitioner's assertion that he faced the Hobson's choice of immediate trial or indefinite incarceration, while applicable to the June proceedings, no longer applied in October, 1964 (brief, p. 49). And yet his position about proceeding to trial, remained unchanged in the autumn.

In addition to the foregoing acknowledgment, it is significant, and both the District Court and the New York Court of Appeals so observed, that the petitioner never moved for a change of venue, the recognized method of avoiding the prejudicial effects of a plethora of local press accounts (A. App., 34a, 43a). See New York Code of Criminal Procedure, §344(2).

The petitioner cites several cases in support of his demand for a new trial on the ground of prejudicial statements *dehors* the courtroom. These authorities stand for materially different propositions than the one he asserts here. Unlike the instant proceeding, in all but one of those cases the defense sought unsuccessfully either a change of venue from the place where the trial was held or a continuance pending a lull in publicity. And in the one exception, court, jury and defense counsel were so terrorized by fear of mob violence that that case has doubtful relevance to the one at bar. See *Moore* v. *Dempsey,* 261 U. S. 86 (1923). This is not to say that the cited motions are the *sine qua non* of preserving the issue for review. But the defense decision to proceed to trial without moving for a change of venue does suggest how little it deemed publicity a burdensome interference. Indeed, the record suggests that petitioner's family was using the press for its own ends (3837-8).

Moreover, in the cases cited, the publicity complained of almost invariably occurred in the non-urban setting of the crime. Near-saturation of the local populace, and thus prospective jurors, was more likely. Where the crime did take place in a metropolitan setting, the proof tendered showed such extensive and bitter radio, television and press coverage that prospective jurors, both grand and petit, were necessarily exposed. Frequently the publicity included "substantial evidence" which in fact was not introduced at trial, such as a confession. In support of their motions for continuance or change of venue, the lawyers there involved offered substantiation for their charge, including polls testing the opinions of local citizenry. *E.g.,*

Sheppard v. *Maxwell*, 384 U. S. 333, 345-6 (1966). Not only did the petitioner by-pass such motions, but to this day, he has offered no support, other than his own statement, that jurors were prematurely partial.

In addition, all too often, in the cited cases, the trial judge gave only the most cursory admonition to the jurors concerning their obligation to avoid reading, or listening to discussions about the case. It is a matter of record that the court below admonished the jury on more than 80 separate occasions "not to look at, listen to or read" anything not received in evidence at trial. Interspersed with these directions were occasional warnings of contempt proceedings against jurors if they failed to obey. *Cf. Sheppard* v. *Maxwell*, *supra*, at p. 353. In commenting on the trial court's care, defense counsel observed, "I want to thank your Honor for all the admonitions you have given the jury" (1675).

While the trial was in progress, a column appeared in a local newspaper which petitioner deemed unfavorable to his defense. At the petitioner's request, the court conducted a special *voir dire*. The result: not a single juror had read the article. *Cf. Sheppard* v. *Maxwell*, *supra*, at p. 357. Petitioner now complains that one trier of fact saw —not read—the article, entitled in big print, "THE FEIN TRIAL" (brief, p. 43).

His present unfounded charge that that juror must have been influenced flies in the face of an expressed representation to the contrary and petitioner's acceptance of it at the time. The petitioner neither moved to substitute that trier of fact with an alternate, nor suggested a mistrial.

The law should not, and will not, permit reversal where a defendant knowingly accedes to a given procedure for reasons of his own, and then, upon conviction, seeks further litigation upon the allegation that the very procedure he acceded to was error.

In sum, petitioner has not shown that an impartial jury could not be, and was not in fact, chosen. His argument is completely devoid of facts showing "that any community prejudice ever existed or in any way affected the deliberations of the jury," the prerequisite he must meet to sustain his charge. *Stroble* v. *California,* 343 U. S. 181, 195 (1952).

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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May, 1969

Appendix I

Statement of Facts Briefed by Respondent in the New York Court of Appeals

THE TESTIMONY AT THE TRIAL

The People's Case

Discovery of the deceased and cause of death

At about 6:10 a.m. on November 8, 1963, **Fred Petraca,** stationary engineer and operator of the Spuyten Duyvil Drawbridge, observed, first with his naked eye and then with field glasses, a body floating face-down between bridge abutments near the mid-channel of the Harlem River, some 150-200 feet away (Exh. 3; 107, 109-12, 119). Following subsequent notification, Patrolman **William Dwyer** went to the scene and observed that the body "was face down and * * * the legs [ankles] * * * were tied with a clothesline rope, and that rope extended from the feet of the body under the water to some kind of pile" (126, 133). He also recalled that the deceased wore pants, black shoes, socks, a shirt collar and tie (129).

Patrolman **William Auld** directed the placing and then raising of the body in a "Stokes basket" onto the police launch to which he was then assigned (150, 153). After being taken to shore, search of various pockets revealed $441, miscellaneous papers and other effects (157-9). Patrolman Auld also testified that the Harlem River's flow depended on the tide; part of the time it ran northerly and part of the time southerly (171).

Dr. **John F. Devlin,** Associate Medical Examiner of Manhattan, performed the autopsy of the deceased on Novem-

ber 9, 1963 (238-40). He described the subject as a "well-developed, well-nourished, decomposed white male, weighed 150 pounds, measured 6 feet, one inch in height" (242). The witness removed a rope [Exh. 9] from the deceased's ankles and observed "superficial [lineal depressions running parallel around the chest] the exact nature of which was not known but which were consistent with a rope being tied several times around the chest" (242-3).

Dr. Devlin explored four gunshot wounds, which he numbered for convenience of description (244, 252). Speaking of wound number one first, he observed that a .22 calibre bullet, which he labelled MD-1, passed through the mandible, the floor of the mouth, the bones at the base of the skull, coming to rest "in the posterior portion of the petrous portion of the right temporal lobe" (245).

> "Also, there were two holes—I mean there were holes in the dura, which is a membrane that surrounds the brain. One of these lied right over the hole in the skull, and in the posterior parietal occipital region there were two small holes, which were secondary to the bullet shearing off and fragments of the bullet which had penetrated this point, and these two fragments were found imbedded in the skull" (245-6).

Wound number two was in the lower jaw of the right side of the face (246). Wound number three lay three inches below the collar bone on the left anterior chest wall and three and one-half inches above wound number four (248-9).

Appendix I

Ballistics examination

Detective **Walter J. Haase**, for 15 years specially assigned to the Ballistic Squad, weighed and examined by microscope the four lead bullets [Exh. 20] recovered by Dr. Devlin (261-5). Three of the bullets [MD-2, 3, 4] were fired from a weapon with a "right twist rifling"; all were of a .22 calibre (265). He described a rifling "as a finishing of the interior surface of the barrel of a firearm" (266). At one point the witness indicated that only on the bullet labelled MD-4 were there six lands and grooves to the right; elsewhere he indicated that all the bullets were so marked (265, 267). While all of the bullets recovered were deformed, MD-1 was the least recognizable (265-7).

The week of the murder

William Tishman, 31-year-old, $22,000-a-year buyer for the Wucker Furniture Company, was for several years a friend of the defendant and his family, and through him first met the deceased (540-2, 601, 614). An active bettor, Mr. Tishman and his gambling partner Bob Katz bet with the deceased, and lost, a total of $16,690 on the 1963 World Series and assorted football contests (561, 603-4, 621). On October 7, 1963, the day after the Series was over, Mr. Tishman called the defendant and asked to borrow "ten, twelve thousand, and he [the defendant] said he was making some arrangements to borrow money, and that he would see if he could borrow for me too" (563, 1513). The defendant noted that he was also indebted to the deceased some $7,000 (563).

Appendix I

The following day, Tuesday, the defendant told Mr. Tishman he was taking out a bank loan (564). Upon a request for haste, the defendant advised that since he was meeting the deceased "on Thursday [October 10th] he would take care of it, pay him what he owed him and what he was going to lend me, and I said I would call Ruby [Markowitz, the deceased] up and ask him if it would be all right and let him know" (564).

The next afternoon, October 9th, Mr. Tishman and the defendant met at the store of the former (565).

> "Well, we went over the conversation that he was to meet Ruby on Thursday and give him the money that he was going to lend Mr. Katz and myself. At that time I gave him $2,500, in cash, which was part of the moneys above the $12,000 I was going to borrow from him, and I also gave him a promissory note [Exh. 53] for the $12,000, and told him that I would give him the balance [$2190] the next day, as soon as I got it from Mr. Katz" (565-6).

At 8:30 a.m. on October 10, 1963, a Thursday, the deceased left his home dressed in business clothes (272). Mrs. **Naomi Markowitz**, his wife of fourteen years, did not see him alive again (272-3). In the early afternoon Mr. **Tishman** advised the deceased, by telephone, of the arrangements he and the defendant had made, and, in addition, placed a bet with him, arranging for a return call after the deceased met with the defendant "to get paid off" (571, 573-4, 657-8). Meanwhile, although this was the day that the defendant was to come to Mr. Tishman's store

for the outstanding $2190, which the defendant had said "he needed," he did not appear (572, 681).

At about noon, or 12:30 p.m. on the same day, **Jerry Bergman** spoke with the deceased by telephone (273, 276). Mr. Bergman, also called Jerry the Whale, a shipping clerk by profession with a criminal record for bookmaking, periodically placed bets with the deceased (274-5, 286, 350). Pursuant to a second telephone call utilizing their standard practice of an answering service and coded names, the deceased called back at about 4:00 p.m., and a meeting was arranged at the corner of 32nd Street and Madison Avenue (276, 278-9). The witness arrived punctually for the 4:30 p.m. appointment, waited in vain about 90 minutes and then departed (279-80).

As the result of subsequent inquiries, shortly after 7:30 p.m. one **William**, also called **Burt Markowitz**, a clerk in a theatre ticket office, was called and asked if he knew where to contact (a man whose description fitted) the defendant (281-2, 307-12, 388-9, 397, 399). Mr. Markowitz, not related to the deceased, two years earlier had introduced the deceased to the defendant upon the latter's request for assistance in finding a new bookmaker (392, 394, 406). Mr. Markowitz contacted the defendant who advised that he had seen the deceased at about 4:00 p.m. that afternoon (354, 357-8, 382-3, 398).

In the meantime, despite the deceased's promise to Mr. **Tishman** that he would call back after meeting the defendant, he failed to do so and Mr. Tishman's efforts to

reach the deceased were in vain (574). Between 7:30 and 8:30 p.m. Mr. Tishman called the defendant, who told him of meeting and paying the deceased at a 61st Street gasoline station, adding that Mr. Tishman

> "still owed him a balance of money, and that he needed it, and would I meet him the next day and give it to him. I told him to come up any time during the day to get the money. And he said he wouldn't be up in my neighborhood. I told him that I was going to meet Ruby at nine o'clock in the morning, and that—he said on his way downtown he would pick up the money at eight-thirty in front of my house" (574-5).

At 8:30 a.m. on Friday, the 11th, Mr. Tishman met with the defendant as scheduled and gave him the $2190 (577-8, 669). At that time the defendant told him that he "received a phone call from Ruby's brother, or brother-in-law," advising that the deceased did not come home the previous night (577, 670). He added that when he paid the deceased at the gas station, "that there was another man in the car. And in case anything happened, he got into the car and that his fingerprints were on the car" (577). The defendant was "worried about this other man" (577).

Mr. Tishman told the defendant of his pending appointment with the deceased at Schrafft's on East 79th Street (579-80). The defendant went elsewhere while Mr. Tishman joined his gambling partner, Mr. Katz, to keep a rendezvous which was, in fact, beyond fulfillment (579-81). During the next weeks Messrs. Katz and Tishman paid the defendant the face value of the $12,000 promissory note [Exh. 53], and the transaction finally concluded with the return of the note in January, 1964 (582, 677-9).

Appendix I

Sometime between noon and 2:00 p.m. on Friday the 11th, the defendant met with Mr. **Burt Markowitz**, the ticket agent, seeking tickets for Sunday's football Giant game (399-400). He also inquired who the deceased's friend was who had prompted the phone call of the previous evening, adding, " 'please get this guy off my back'; he didn't want him to know where he lived, or his phone number, and so forth" (400).

On Saturday the 12th, the missing car of the deceased was spotted by his brother-in-law and his grocer-gambling partner, who together searched the streets of Manhattan (317-18). It was located on First Avenue at 64th Street (321-3). Members of the dead man's family were contacted, the automobile keys thereafter delivered and, with assistance from the nearby precinct, the car and trunk were unlocked (323-7). Both were empty (327). Mr. Josephy drove the car to the Brooklyn garage where it was ordinarily left; while there he observed one of the members of the family unlock the glove compartment (327-8). Football tickets and three hundred dollars were uncovered (328).

That same day, Mr. **Burt Markowitz** received a visit from the deceased's brother-in-law, Mr. Silverstein (400). The latter informed him of finding the missing automobile and two sets ("a set is a single ticket for all the games that the Giants play at home") of football tickets in the glove compartment (401). Mr. Markowitz called the defendant, passing on the news of the discovery of the missing automobile (402). He recalled the defendant answering, " 'Gee, * * * my fingerprints are all over the car' " (402).

Appendix I

The site of the crime

In June, 1963, the defendant, who was a limited partner in the organization owning 406 East 63rd Street, asked **J. Harvey Rosenthal**, the general partner, if one of the remaining apartments might be leased by one William Weissman (503, 506-7, 1445). Mr. Rosenthal, long a friend of the defendant, agreed, giving him a two year lease to be signed for apartment 5-B (504, 508, 510). That same month the defendant had asked **Billy Tishman** to join him in renting such an apartment (546). Mr. Tishman refused (547). A short time later, the defendant returned the lease to Mr. **Rosenthal** bearing the Weissman signature; the rental was $178 per month (508, 510). The defendant was given the keys to the apartment, and each month thereafter delivered the rent in cash (511-12). In July the defendant obtained furniture for the apartment from Mr. **Tishman** (524, 548). This included wall-to-wall carpeting "a persimmon orange color," and living room and bed room furniture (549). On two occasions Mr. Tishman went to apartment 5-B in connection with the furnishings; on the second visit he met the defendant, who was seated watching television (551-4, 599-600).

In August the defendant telephoned Mrs. **Lazarus** and

> "gave me an address on East 63rd Street, and told me to meet him there. And when I went there, he told me that—he asked me how I liked the apartment. And he told me it was an apartment that he had taken as a bachelor apartment.
>
> "Q. Do you remember the address of this apartment? A. 406 East 63rd Street.

"Q. And was the apartment furnished at the time you went there? A. Partially; not completely" (1116).

* * *

"Q. Did you have sexual relations with the defendant on your first visit to the 63rd Street apartment? A. Yes.

"Q. Now, did you have any further conversation with the defendant before you left the apartment that day? A. I did.

"Q. Please keep your voice up now, and tell us what was said. A. He asked me to please have a telephone installed in the name of Bill Weissman, and to please have another set of keys made for the apartment, and to please pay the maid service bills that had been sent there" (1117).

* * *

"Q. And did you ask the defendant who this Bill Weissman was? A. No. He said that that was the name he was using for the apartment.

"Q. And did you have a telephone installed? A. I did" (1118).

* * *

"Q. And what name did you give as a reference? A. I gave Mark's name.

"Q. Mark Fein? A. Yes" (1118).

In October, 1963, "a week or two after the World Series," when his delivery men were unsuccessful in gaining access to the apartment, Mr. **Tishman** spoke with the defendant "and he told me that he forgot to tell me that he got rid of the apartment" (555, 557, 652).

Mr. **Rosenthal** added "I believe in December, Mr. Fein indicated to me that the tenant no longer wished to occupy the apartment" (512). At Mr. Rosenthal's request, the

defendant agreed to obtain the rent until 5-B could be leased anew (513-14). The defendant returned the keys and the following month the "Weissman" lease was terminated (514, 517).

The defendant's activities following the crime

There were three persons called to assist the defendant in concealing the homicide. They were Carmela Lazarus, Geraldine Boxer and David Broudy.

Carmela Lazarus, 37, who was also known during various times in her life as Carmela Donofrio, Candy Delmar, Gloria Keith, Gloria Gray, Gloria Kendal, Mrs. Fontaine, Margaret Foster and Gloria Foster (it was this name by which the defendant knew her), was convicted for vagrancy at the age of 18 and had commenced a career of prostitution by her 21st birthday (1099-1105, 1119, 1217). She remained so occupied until January 8, 1964 (1254). Twice married, presently to Michael Lazarus, otherwise known as Michael Paris, Mrs. Lazarus plied her profession during her husband's business hours and also acted as a procurer of girls (1106-9, 1231).

She first met the defendant in 1960; he shortly became a "frequent" paying customer (1112). Although there was no fixed arrangement, by 1963 the defendant gave her between $400 and $700 every month, a stipend which also covered the cost of girls Mrs. Lazarus supplied, at his request, for his friends, and exhibitions of lesbianism (1113-16, 1123, 1289).

Appendix I

Mrs. Lazarus testified at both the grand jury proceedings and the trial itself after having waived her immunity (1189-90).

David Broudy, 32-year-old cab driver, hairdresser, aspiring inventor, who at the time of the trial was convalescing from an injury sustained the previous summer, had known Mrs. Lazarus since 1957, and her husband Michael, a fellow hairdresser, some fifteen years (875-9, 953). He testified under a grant of immunity for the crimes of accessory after the fact in removing a body and failing to report a death, and expressed a willingness to "do anything for Gloria [Mrs. Lazarus] * * * lie for Gloria" (891, 959, 978-9).

Miss **Geraldine Boxer,** 22-year-old college graduate and copy writer, met daily, in early October, 1963, with Mrs. Lazarus (693-4, 700). Each day, upon the completion of Miss Boxer's work at her 59th Street and 10th Avenue office, the two would meet for a light supper, after which Miss Boxer would drive Mrs. Lazarus to the Swedish School of Massage at 46th Street and 8th Avenue, where the latter was attending evening classes (700-1, 1130). Miss Boxer would then continue on to her own course at the Fashion Institute of Technology (699-701). Final arrangements for the daily rendezvous would ordinarly be made by phone during the day (702).

On the afternoon of October 10, 1963, Miss Boxer telephoned Mrs. Lazarus, arranging for their daily night school rendezvous; she placed the time of the call between

2:30 and 4:30 p.m. (702, 704). Shortly after 5:00 p.m., the hour Mrs. **Lazarus** fixed for that telephone conversation, Miss **Boxer** left her office, picked up her nearby car and drove to Mrs. Lazarus' apartment at 125 East 73rd Street (705, 905, 1132). Double parking, she called on the building's intercom; Mrs. Lazarus was not there, but one Sandra Ede answered and a brief conversation ensued (705-6). Miss Boxer estimated the time to be between 5:35 and 5:40 p.m. (707).

Meanwhile, at an hour which Mrs. **Lazarus** thought to be between 5:30 and 5:45 p.m., the defendant telephoned, and said,

> " 'What are you doing, Gloria?' And I said, 'I'm getting ready to go to school.'
>
> "And he said, 'I'm at the apartment on 63rd Street, and I'd like to see you right away.' And I said, 'That's impossible.' I said, 'You'll have to wait until I finish school, which will be about eight or nine o'clock.'
>
> "And he said, 'I can't wait, Gloria. I have to see you right away.' And I said, 'Well, if there is anything I can do for you meanwhile, if I can would you like me to send somebody over?
>
> * * *
>
> "So he said, 'Please, Gloria', he said, 'I must see you. Don't fail me.' So I said, 'I'll be right over.'
>
> * * *
>
> " 'I'll leave immediately' " (1133).

Mrs. Lazarus spoke to Sandra and left, taking a taxi to the defendant's 63rd Street apartment (1134). She was

dressed in slacks, the outfit she intended to wear to her exercise class, and judged her arrival to be before 6:00 p.m.; ringing the bell, she was let in by the defendant (1135, 1333).

> "A. He was very flushed. His hair was messed, and his eyes were enormous. And he said, 'Come in.' And I went in" (1136).

In the living-room she saw a big brass-trimmed trunk, adjacent to it a duffle bag, and recalled that a piece of the carpeting was cut (1136). The chair and couch had been rearranged since her prior visit (1335). Inquiring "what happened?" * * *

> "He said to me, 'what do you think is in that trunk, Gloria'?
>
> * * *
>
> A. I said, 'I have no idea.'
>
> "Q. And what, if anything, did the defendant say? A. He said, 'It's the body of a dead man, my bookmaker, Ruby.'
>
> * * *
>
> "A. He said, 'I had to meet him this afternoon to pay him the money that we lost on the series.' And he stood up from where he was sitting, and he started to show me a banknote—a green piece of paper. And he said, 'Look at this. Poor Billy, he didn't have the money. And I met him at four o'clock. And he came up here. And we were talking. And we had words. And I shot him.' He said, 'Please, Gloria, help me.' He said, 'There's nobody else I can turn to. I can't call any of my friends; I can't call my famliy. You're the only one. Please help me.'

"So I said, 'Well, what do you want me to do?' So he said, 'Help me get the trunk out of here and get rid of it.'

"So I said, 'Well, why don't you call the police and tell them that while you were talking to this man, somebody came in and shot him, stole the money and ran out?' So he said, 'That's good,' he said, 'but I can't call the police.' He said, 'I can't be involved with the police.' He said, 'I would be ruined socially and financially.' He said, 'I just could not be involved with the police, nor with a bookmaker.'

"So I said, 'Well, what do you want me to do?' So he said, 'The first thing you have to do', he said, 'is to call another friend—call a friend.'

"I said, 'Call a friend?' I said, 'Why should I call a friend?' I said, 'I'm very strong.' So he said, 'The trunk is very heavy, Gloria.'

"So I said, 'But I'm very strong. How heavy could it be?' He said, 'Believe me, it's very heavy.'

"So I went to the phone and I called my friend, David" (1137-9).

At an hour which he fixed as 5:30 p. m., Mrs. Lazarus telephoned Mr. **Broudy**, who she knew was temporarily unemployed; he left his Bronx apartment and borrowing his brother's car drove immediately to 63rd Street and First Avenue (875, 881-2, 961, 1346).

Meanwhile, Miss **Boxer** had driven to 406 East 63rd Street, parked in front and rang the Weissman apartment from the lobby intercom (708-9). There being no response, she left; as she was returning to her car she saw Mrs. Lazarus, who had responded to her intercom buzz (709-10, 1139). They conversed and Mrs. Lazarus then returned

upstairs while Miss Boxer awaited the arrival of Mr. Broudy (710). Mrs. **Lazarus** inquired of the defendant,

> " 'Are you sure the man in the trunk is dead?'
>
> "Q. And what did he say when you said that? A. He said, 'Gloria', he said, 'He's stone, cold dead.' He says, 'Look'. And he lifted the lid to the trunk, and I saw part of an arm, and some new clothesline, and some white material that looked like a shirt. And I turned my back, and I said, 'Spare me the gory details.' And he put the lid down, and went to the window, and he was looking out.
>
> "And I said, 'Do you think anybody heard the shot?' And he said, 'No, Gloria, I don't.' He said, 'It was over an hour ago, and I have been watching, I have been looking out the window, and I haven't seen anything.'
>
> "And so I said, 'Well, you must have been a very busy boy.' I said, 'How did you get the trunk?' And he told me that he bought the trunk in Spanish Harlem; that it was difficult to get a trunk that size because of the language barrier" (1140-1).

In the meantime ten to fifteen minutes after Mrs. Lazarus had left her, Miss **Boxer** saw Mr. Broudy and his car, as described by Mrs. Lazarus (711). She walked down the block after him, and introduced herself (713, 882-3). Mr. **Broudy** estimated the time as 6:00 p.m. (882). The two conversed, walking towards Miss **Boxer's** auto (713). She recalled that a short while after reaching the building, Mr. Broudy rang the Weissman apartment and spoke to Mrs. Lazarus by intercom; a few minutes later, Mrs. Lazarus reappeared (713, 1141).

Mr. **Broudy's** recollection differed, he thought that he and Miss Boxer had come upon Mrs. Lazarus while he was still talking with Miss Boxer (882-3).

Mrs. Lazarus spoke separately with Mr. Broudy and then Miss **Boxer** (713-14). The two women then entered the building and ascended to apartment 5-B while Mr. **Broudy** went to purchase a cheap pair of gloves (714-15, 749, 884). Mrs. Lazarus "knocked on the door or rang the bell, but the door was opened by someone from the inside slightly. Several seconds later" Mrs. Lazarus pushed it open all the way and upon entering, directed Miss **Boxer** to the bedroom (715, 749-50, 1141). Miss Boxer was left alone for some minutes (716), while Mrs. **Lazarus** spoke to the defendant advising him of the arrival of her friends (1144).

Mr. **Broudy**, arriving after his purchase of gloves, was introduced by Mrs. Lazarus to the defendant (892, 972-3). Mr. Broudy was thanked for his help, and when he inquired, "What the hell happened here?", the defendant answered that

> "he was paying a gambling debt to his bookmaker, and the doorbell rang, and somebody burst in; and evidently the person, this bookmaker knew this person and said, 'Oh, my God.' This person shot this man and scooped up the money and left" (893).
>
> * * *
>
> "I said, 'Well, what did this guy look like?' * * * He said he was a tall, dark guy with a hat.
>
> "Q. Did you have any further conversation with the defendant? A. I said 'Well, how did he know that you people were here?'

"And he said, 'Well, he had a previous appointment.'

"Q. Who had a previous appointment? A. This bookmaker.

"Q. Yes? A. 'And he was going to be late, and he called; and he was saying that he was going to be here. And that was that.'

"Q. Was there any further conversation with the defendant at that time? A. Then he said—he said, 'I never saw so much blood.'

"Q. Who said this? A. The defendant.

"Q. Yes? A. And I said, 'Well, is this trunk going to leak?' And he said, 'No,'—he put some canvas bags on the bottom of the trunk.

"Q. Did you have any further conversation with the defendant at that time? A. I said, 'Where did you buy the trunk?' And he said either Spanish Harlem or East Harlem * * * it was one or the other" (894-5).

Miss **Boxer** was then brought into the living room and she too was introduced to the defendant, whom she had never seen before (717-18). She estimated the hour to be 6:10 to 6:15 p.m. (718). In the middle of the room, near the window, was a black steamer trunk approximately 32" x 32" x 43", trimmed with brass or gold (720-21, 794-6, 895, 896). Miss Boxer and Mr. Broudy independently noticed a portion of the carpet had been torn off, "something like 18 x 18 inches, and it was cut away in a jagged pattern" (720, 895). A conversation followed concerning the difficulty of fitting the trunk in either Mr. Broudy's or Miss Boxer's car and the defendant "suggested that he could rent a car, a station wagon" (722-3, 896-7, 1145).

The defendant then telephoned an auto rental business located at 445 East 78th Street (821-2). He reached an answering service, the concern having closed at 6:00 p.m., and Miss Boxer heard him say that "he had rented a car [or station wagon] from them sometime before and that he would like to rent the same car [or station wagon]" (723-4, 823-6). There was a follow-up call from **Samuel Newman**, president of the rental concern, who advised that the defendant's request for a station wagon would be filled (725-6, 821, 829-33). Mr. Newman then arranged for the vehicle to be left at the garage which adjoined his business (832-3). Meanwhile, Miss Boxer recalled the defendant saying that he "would pick it up shortly; he would be there to get * * * The car, the station wagon" (724-5, 897-8).

Mrs. **Lazarus** and the defendant then departed to pick up the station wagon (727, 898-9, 1146). On their way out of the building, Mrs. Lazarus recalled they came upon, and the defendant greeted, the rental agent (1146-7). **Donald Galka** confirmed this meeting (1148-50, 1452, 1476, 1552). The waiting vehicle was obtained from garage attendant **Earl Roper**, the defendant giving a one dollar tip (1014-15).

Between fifteen and twenty minutes after leaving, they were back with Miss **Boxer** and Mr. Broudy at the apartment (727).

Mr. Broudy and the defendant moved the trunk to the elevator while Miss Boxer watched Mrs. Lazarus pick up two duffle bags, one of which came from beneath the trunk and the other, shaped "sort of like a pillow," contained

pieces of carpeting (728-9, 899, 1150, 1366). After descending, the women by stairway, the men and trunk by elevator, the trunk and duffle bags were lifted onto a Chevrolet station wagon which was double parked by the building's front (729-31, 900-2, 913, 1149). It was the same car that had also been rented by the defendant the day before (838-9, 1017-18, 1048-9). Three entered the station wagon, leaving the defendant behind, despite his insistence that he come too (731-2, 904).

After the defendant had given Mr. Broudy the keys and told him where to return the vehicle, the three drove to Mrs. **Lazarus'** building and double parked while she went upstairs (732, 905, 1152). Mrs. Lazarus estimated the hour to be between 7:00 and 8:00 p.m. (1369). Despite separate communications over the intercom from both Miss **Boxer** and Mr. **Broudy**, Mrs. Lazarus was gone an estimated 45 minutes (733, 791, 906). Mrs. **Lazarus** thought "ten to twenty-five minutes" had elapsed (1370). While in her apartment, she left a message with Sandra, took some sixty dollars in cash, and had herself a drink (1153). Upon return, she called Mr. Broudy aside, and handed him forty to fifty dollars (734, 907).

The three then drove off, up the East River Drive, onto the Harlem River Drive to the end of Dyckman Street and the Hudson River, retraced their path to 158th Street and then turned north again on the Harlem River Drive, stopping at 178th or 179th Street (737, 908). The trunk was taken from the tailgate of the station wagon (Mr. **Broudy**: "All three of us dragged it out and lifted it over the wall

into the river"; Mrs. **Lazarus**: "All three of us got out, and we carried the trunk to the edge of the water, and pushed it over into the water"; Miss **Boxer**: "She [Mrs. Lazarus] motioned for me to help. And I put my hand somewhere. I did touch the trunk. Just how much of it I lifted I can't judge"), carried to the river wall and dumped over it (738-9, 801, 908, 1155). As Mr. **Broudy** recounted, "There was a crash and a splash" (908). "A thump, and then a splash" was Mrs. **Lazarus'** description, who then returned for the duffle bags and threw them over also (739, 909, 1156). By then it was dark out, the time estimated 8:30 p.m. by Mrs. Lazarus; 7:30 to 7:45 p.m. by Miss **Boxer** (739, 1372).

The three drove to mid-town Manhattan, and dined at a French Restaurant on 48th Street (739-41). Afterwards they stopped briefly for Miss Boxer to run a personal errand (Miss Boxer remembered that the errand was attended to on the way to the meal), and then Mrs. **Lazarus** was taken to her apartment (740, 912, 1157). Sandra Ede was still there (1157). Later on, that evening, the defendant called, inquiring if all went well (1158).

Meanwhile Miss **Boxer** and Mr. **Broudy** drove the station wagon to a garage adjoining a rental agency on 78th Street, between York and First Avenues (743-4, 912-3). Parting shortly after, Mr. Broudy and Miss Boxer did not meet again until the following February at the police station house (750, 913).

A day or two after the murder, the defendant telephoned Mrs. **Lazarus** and asked her to repair the carpet (1158-9).

When she balked, he said, "Please Gloria, don't let me down now" (1159). On Saturday the 12th, Mr. **Broudy** and Mrs. Lazarus went to apartment 5-B at 406 East 63rd Street, let themselves in, and repaired the torn carpet, using a razor, curved needle, thread and extra pieces of carpet that had been stored in a closet (914-6). Mrs. Lazarus washed the tables and chairs, and upon "probing in the wall near the window" attracted Mr. Broudy's attention (917-18). He saw a hole, "the size of a silver dollar" which he then filled with "prepared plaster" (917-18).

Mrs. **Lazarus** had a different recollection of the chronology of the latter event, placing it some days after the carpet was repaired (1161). As she remembered it, the evening following the repair of the carpet, the defendant called (1159).

> "He asked me if the rug was fixed, and I said, 'Yes, it was.'
>
> "And he said, 'Now, please have the lock changed,' he said, 'because I am expecting some furniture to be delivered on Monday, and I don't want them to see the carpet' " (1160).

Mrs. Lazarus directed her maid to have the lock changed the following Monday; it was (1160-1). Within a few days thereafter, meeting the defendant in Apartment 5-B at his request, she noticed a hole in the wall (1161-2). "And I said, 'could that possibly be a bullet hole?' And he said, 'Yes, it could be' " (1162). The subsequent probing with a kitchen knife succeeded only in enlarging the aperture (1162). The defendant asked her to fill the hole with putty.

"I said I didn't know how. He said to please ask David, but I didn't. I waited a few days, and he called me up and he said, 'Please let me get some sleep after all we have been through. Please, this last thing, please do it.'

"Q. When he said this to you what, if anything did you say to him? A. I said I would * * * ask David" (1163).

Mrs. Lazarus got in touch with Mr. Broudy, who carried out the directive (1163-4). Thereafter, Mr. Broudy announced the hole was repaired, handing over a piece of lead he had found in it (1163).. Mrs. Lazarus offered this to the defendant, commenting; "David [Broudy] said it looks like a .22 or .25. He told me to ask you, 'What is it?' The defendant looked at it, shrugged his shoulders and * * * left the bullet on my night table in my bedroom" (1165). Two days later, the defendant volunteered, "By the way it was a .22" (1166). Some three weeks later, Mrs. Lazarus threw the missile away (1376).

As Mr. **Broudy** recalled the order of events, approximately two weeks after he and Mrs. Lazarus first repaired the carpet, the two returned to the death scene and Mr. Broudy painted the area he had previously patched (919).

About a week later, following a conversation with Mrs. Lazarus, Mr. Broudy returned to the patched wall, and with a small chisel removed a piece of lead, which he pocketed (921-2). That same day he gave it to Mrs. Lazarus (923-4, 993). Mr. Broudy plastered the hole again and returned the next day, with Mrs. Lazarus, intending

to paint the patch; it had split, however, so he replastered it (923-5).

Some time after reading about the discovery of the deceased's body, Mr. Broudy spoke with Mrs. Lazarus, returned to apartment 5-B and proceeded to paint the entire living room (961-7, 1167). A few days later the defendant told Mrs. **Lazarus**, "Get rid of all the furniture in the apartment now, and get rid of the rug, get rid of everything" (1168). Upon Mrs. Lazarus' stated reluctance to remove the rug, the defendant insisted,

> "there might be another hole there in the floor where the piece had been torn up the first day, where it was patched up, and he said, 'if there was, please fix it or have David fix it,' and I told him to do it himself because I couldn't ask my friend to do anything else for me, and he said that he couldn't because he was the last one to see the man alive and he thought that he was being followed, so that he couldn't go to the apartment" (1171-2).

There was another meeting between the two, following which Mr. **Broudy** removed many of the furnishings from 5-B, giving all but the radio and television set to Mrs. Lazarus (927-8).

There was one final set of visits to the murder site, during which Mr. Broudy cut up the carpeting, removed it to his car and then disposed of it in separate places in the city (928-30). During one of these visits, Mr. Broudy filled a small hole in the living room floor of apartment 5-B with wood cement (931-3, 1172).

Here, again, Mrs. **Lazarus'** recollection of chronology differed from Mr. Broudy's, she placing the disposal of the furniture after the carpet had been cut up (1173). As she recounted, the defendant called "towards the end of November" and a meeting was arranged (1173).

> "[H]e told me that it was imperative now to get rid of the furniture. Please don't let him down now after all we have been through. So I went into a phone booth and I called the storage company. He said 'Just get rid of it. I don't care what you do with it.' I called the storage company and made arangements for them to come and take the furniture out.
>
> "Q. What storage company was this? A. The Century Moving & Storage.
>
> "Q. Have they done work for you before? A. Yes, many times.
>
> "Q. And was the furniture removed from the apartment? A. Yes" (1173-4).

She stored it under the name of "Weissman" (1194).

The defendant and Mrs. Lazarus kept in "frequent" contact, and, during December, after she was questioned by two New York Police Department detectives, she met with the defendant (1177).

> "This Leman and Lyons were here, two detectives, and they asked me about the apartment on 63rd Street, and about you. And I told them that I knew you, that you were a good friend of mine, and a fine person; but that I didn't know anything about the apartment on 63rd Street" (1177).

At Christmas time, she met the defendant at the office of his attorney, Mr. Blinder (1178). "[W]e said that I

would tell the detectives when they came back again that a friend of mine had stayed in the apartment [that her] * * * name was Margaret Foster * * * [that] she went to Florida, and * * * just never came back" (1178).

Shortly thereafter, Mrs. Lazarus and her husband went to the Virgin Islands for "eight or nine days" (1179). Just before she left or just after she returned, Mrs. Lazarus, on being questioned by the police, told them about her roommate Margaret Foster, whom she identified as a girl who entertained the defendant on occasion and who was presently seeking a Florida divorce (1277-80).

Police efforts to obtain information about "Margaret Foster" accelerated after her return from the Caribbean; during one attempted police visit, Mrs. Lazarus hurriedly left her apartment forsaking all of her belongings (1180, 1604). She went to the Hotel Warwick (1182).

She met the defendant a few days later, January 11, 1964, and told him of her plight (1180-1). The defendant said he needed a "couple of weeks" to "work it out" (1181). In about a month he would provide her with money for a new apartment and clothes (1181). A date was made, and as Mrs. Lazarus was leaving, he said, "the only thing I have to worry about now is the station wagon" (1181). [On December 4, 1963, he had paid Alpine U-Drive in full for rental on the station wagon the previous October 9th and 10th (1058-9).]

In mid-January, 1964, the defendant visited Messrs. **Odell** and **Newman**, at the auto rental office, seeking bill-

ings for the past six months (835-6, 1060). No complaint about the October 10, 1963, charge was made (836, 1061).

On January 28, 1964, the defendant wrote the following letter to Mr. **Newman**:

> "Gentlemen: As you know, in the last two weeks I have had occasion, for personal reasons, to examine carefully the statements which I received from you for the last six months. As a result, I have come to the conclusion that the charges made for the rental of an automobile on October 10th were not incurred by me, directly or indirectly. My records indicate that on that evening I not only did not rent a car, but had no use for a rental automobile at all. I am sure that this billing to me on your part resulted from inadvertence. However, I feel it necessary at this time to request that the amount which I had previously paid to you for the rental on that date be credited to my account for further use.
>
> "If there is anything in your files, or within your knowledge, which would indicate that someone acquainted with me used my name without authority on that date, I would appreciate it if you would communicate that information to me in writing at my home.
>
> "Unless I hear from you concerning this matter within the next five days, I will assume that you acknowledge the error which I pointed out in this letter and credited me with the amount for this erroneous rental.
>
> "Thanking you for your co-operation.
>
> "Very truly yours,
>
> "(signed) 'Mark Fein'." (1063-4)

During a subsequent telephone conversation,

> "Mr. Fein said he did not take the car out on October 10th in the evening, and said that there was a twenty-one dollar and some change credit due him, and I said I would give him credit for it, * * *.
>
> "Q. And you gave him credit for it? A. We did" (837).

The defendant never complained about the bill for October 9th (1066).

Meanwhile, Mrs. Lazarus and her husband went to Montreal, Canada, for a month, where he obtained employment as a hairdresser (1182-3). On February 11, 1964, Mrs. Lazarus returned to keep her rendezvous with the defendant (1138). When he did not appear she telephoned him (1182). "[H]e told me that he couldn't meet me because I was * * * too hot; and that he would send somebody from the law firm to speak to me" (1184). Mrs. Lazarus met with Mr. Whelan, the defendant's private investigator, and spoke with him for some 45 minutes, but obtained none of the money the defendant had promised (1184-5, 1378-9).

That evening she spoke once more with the defendant (1185-6).

> "I told him, 'Thank you very much for sending me such bad news in the form of Mr. Whelan.'
>
> "Q. What did he say? A. He said, 'Oh, we'll have to sit down and talk.' And I said, 'I can't talk to you any more, because I can't trust you.' And that's my last conversation I ever had with him" (1186).

Appendix I

On a date which he fixed as late in January or early February, 1964, Mr. **Broudy** telephoned the defendant.

> "Q. Now, will you tell us what conversation you had at this time with the defendant on the telephone? Keep your voice up. A. I said, 'Gee,' I said, 'Why don't you do something for this girl?' I said, 'She lost everything,' I said, 'her clothes, her apartment.'
>
> "I said, 'She did you a big favor, and so did I.' I said, 'Do something for her.'
>
> "And he said, 'Well, let her contact my attorney.'
>
> "And he said, 'If she don't trust me to have her attorney contact his attorney' " (935-6),
>
> * * *
>
> "Q. Did he say anything else? A. He said, 'We can only hurt each other.' " (p. 936).

Mrs. **Lazarus** left for Canada the day after meeting Mr. Whelan, remained for a week and then returned, telephoning Detective Leman for an appointment, and visiting Mr. Broudy for the night (1186-8). The following day, February 20, the two drove to the Century Moving & Storage Company and Mrs. Lazarus was picked up by Detectives Leman and Gilmore (1187-8, 1514-16). The defendant was arrested that evening (1523, 1526-7).

Two or three hours after meeting the police, Mrs. Lazarus telephoned Mr. **Broudy** (938). Thereafter, he went to the station house, saw her there, and was himself questioned (938-9).

When interrogated by the police during the early hours of February 21, 1964, Mr. **Broudy** denied that the defend-

ant had told him anything (968-9). "I * * * wasn't in a hurry for this man to get arrested, because they would just get to me after him" (970). "I didn't want to hurt the guy" (971).

Similarly, in reply to initial questioning, Mrs. Lazarus said that the defendant told her, when she responded to his call on October 10th, " 'I was sitting, talking with him [the deceased]. And some guy came in, and shot him, and grabbed the envelope, and left' " (1344).

Twice during the months following, Mrs. Lazarus recanted her narration of the defendant's crime (1201-3). The first occurred on June 30, 1964, and was withdrawn the following day; the second was on September 28, 1964, and was withdrawn two days later (1201-3). On each instance the recantation consisted of a denial that she saw a body in the trunk and a denial that the defendant admitted shooting the fatal bullets (1201-3).

Defendant's prior indebtedness

Sometime in 1962, the defendant came to Mr. Tishman and told him "that a friend of his that had some bonds * * * was trying to raise some cash. * * * And would I take them to a bank and see if I could * * * get some money on them" (584-5). This was done and a $17,000 loan was arranged (585). Several months later, the defendant gave Mr. Tishman the money back, and in turn received the bonds (585).

Appendix I

In April, 1963, a second transaction took place between the two (585). This time Mr. Tishman "asked him if these were really his bonds, because he was paying me a gratuity for taking care of this, or this friend of his; and if they were really his, I didn't want the gratuity. And he [the defendant] said they were * * * his bonds" (585-6). $12,000 was involved, and it was eventually paid back after several three month renewals of the three month bank note (586-7).

There were, in addition, other instances when Mr. Tishman lent the defendant money (586-7). From time to time, Mr. Tishman borrowed cash from the defendant in amounts which he believed did not exceed $500 per occasion (654-5).

In May, 1963, the defendant asked if Mrs. Lazarus,

> "could loan him any money, because he had lost a lot of money—I think on baseball. And I said, well, maybe I could loan him something, a few hundred. And he said, well, that wouldn't help much because he had lost sixty thousand dollars" (1113).
>
> * * *
>
> "I loaned him whatever I could.
>
> * * *
>
> "Q. Well, how much was it? A. About sixteen hundred dollars.
>
> "Q. Was that money of your own? A. It was all my savings that I had [and] * * * I asked several other people if they could help me out and loan me money. And I did borrow from two other people.

"Q. And how much altogether did you collect and give to Mark Fein? A. It was close to three thousand dollars" (1114).

For several months during the summer of 1963, the defendant "didn't have much money", and when, in September, he finally finished paying Mrs. Lazarus back, about two thousand dollars passed hands, some of which related to the May loan (1123-4). This meeting occurred between 4:00 and 5:30 p.m. on a day she designated as Yom Kippur ("he had to be home by sundown"); it was the last time Mrs. Lazarus saw the defendant prior to October 10th, the day the murder was committed (1402-4, 1433).

Defendant's statements to the police

On October 15, 1963, Detective **Eugene O'Neill** spoke with the defendant at his Park Avenue office (433). Although he admitted knowing the deceased, "I get theater tickets and football tickets from him," the defendant denied having met with him on October 10th, or being aware that the deceased was a bookmaker (433-4).

On October 21, the defendant met with officer O'Neill at the squad house, accompanied by counsel (435).

"Mark Fein said he would like to make a statement at this time.

"He said, from a telephone conversation with Ruby Markowitz, they planned on meeting on October—this conversation—telephone conversation—took place on October 9th, the Wednesday night. They had planned to meet at First Avenue, in the Sixties.

"Mr. Fein says, 'I went to First Avenue, somewheres in the Sixties,—

"Q. Did he tell you what date he went? A. On October—This was October 10th,—

"Q. Go ahead. A. —at about 3:30 or 3:35—3:45 p.m. He saw Ruby sitting in a car, stopped at a pump, at a gas station. He said, 'I was unable to get into the front seat of the car, so I got into the rear. In the rear was a man sitting.

"I asked him to describe this man. He said the man was a male, white, about 45 years of age, a dark complexion, a heavy beard, wearing a gray suit, a Fedora, and possibly Italian" (435-6).

* * *

"Mr. Fein then said, 'Ruby pulled down off the gas station, and stopped the car. I then got out of the rear seat and sat in the front. I gave Ruby $23,890 [*sic*]. Ruby gave me fourteen Giant football tickets, in an envelope. I said goodby, and walked away from the car.'

"Q. Now, when the defendant told you this, did you then say anything to the defendant? A. I did. I said to him, 'This isn't the same story you gave me in your office.' Fein replied, 'I just didn't want to get involved' " (437).

Upon questioning, the defendant said "that he would contact Ruby Markowitz [the deceased] by calling an answering service. He could ask for Mr. Winnick, and tell him that Mr. Shore called" (442). He added that he "had met Bill Tishman on October 11th in the morning and told him that he had taken care of the gambling debt" (442-3).

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On December 27, 1963, Detective **James Leman**, and four brother officers, met with the defendant, his private investigator and two attorneys at the latters' office (1477, 1489).

"* * * the defendant stated that on October 10th he had been in Yonkers, [at the Red Devil Paint Company also known as the Technicolor Paint Company] prior to the meeting with the deceased, Rubin Markowitz. And as a result of a telephone conversation with the deceased on October 9th, he had told the deceased that he would be traveling down the East River Drive, and that when he wanted to pay him the money he would meet him somewhere on the east side, and asked the deceased to pick out a spot" (1491).

* * *

"He conducted his business * * * [and left Yonkers] * * * between 2:30 and 3:00 p.m." (1492).

* * *

"He stated, when he arrived at this gas station [at 62nd Street and First Avenue] he seen the deceased's car parked at a gasoline pump" (1492).

* * *

"[A]fter the deceased pulled away from the gas pump he got into the front seat alongside of the deceased, Rubin Markowitz. And Rubin Markowitz pulled his car into 62nd Street, east-bound, between York and First Avenue. And about in the middle of the block, Rubin Markowitz pulled his car over to the side. He stated to Mark Fein, 'It's all right', whereupon he pulled out an envelope containing $23,690.

"Q. Who pulled out an envelope? A. The defendant Mark Fein.

"Q. Go ahead. A. —handed it to the deceased. Whereupon he handed him fourteen football tickets for the New York Giants game.

"Q. You say he said the deceased then handed him, Mark Fein, fourteen football tickets for the New York Giants game? A. Yes.

"Q. What else did he say? A. He was asked what was done with his car when he pulled up to the gas station. He said he double-parked it on First Avenue. He said then he went to his car and he went to Brooklyn. He was asked to where, and he said to the Lambert Container Company in Long Island City" (1493-4).

* * *

"A. He was asked how long this took. He said just a few moments, and it was now ten minutes to four" (1494).

* * *

"* * * he spoke to a Mr. Dick Lambert, or to a plant superintendent by the name of Don Dunphy.

"He was asked what he done next. He stated he conducted his business there, and then he went home. He was asked what time he arrived home, and he stated about 7:00 p.m. that evening" (1495).

[Neither Mr. **Lambert** nor Mr. **Dunphy** had any recollection "one way or the other" if the defendant was at their plant on that date (1616-27).]

The defendant gave his code name, for his gambling activities with the deceased, as "Shore" (1495). When asked where he had obtained the $23,690,

"At this point the defendant leaned back in his chair. And he got up and he left the conference room,

with his attorney, Albert Blinder. And then he stayed outside for a period of about five or ten minutes'' (1496).

Upon returning he stated that he got $12,000 the previous April on a loan he obtained through Billy Tishman after putting up $13,000 to $15,000 worth of bonds as collateral; $5,000 on a World Series bet through a bookie named Richie; $2,500 from Billy Tishman on October 9th; ''And the rest he got here and there; he borrowed here and there'' (1496-7). [**Richard Becker**, ''Richie'', testified that the defendant stopped betting with him during the summer of 1963 (1748, 1752). There were no world series wagers placed by the defendant and thus no money given him by Richie, who neither saw nor spoke to the defendant in September and October of that year (1758-9).]

The defendant told Detective **Leman** that Billy Tishman was ''paying this loan off'' that he received on the bonds, and that he (the defendant) received an I.O.U. from him for this April transaction; no I.O.U. was obtained, however, to cover the October loan of $12,000 (1499, 1650-1). He denied being in debt to ''Shylocks,'' knowing a man named ''William Weissman,'' or having any relative by that name in apartment 5-B (1500-1).

> ''And I asked him 'Why would William Weissman be listed as an employee of the Fein Industries as an engineer?' And that 'your name appears as being an uncle of this William Weissman.' At this point, the defendant got up from his chair again and left the room [with his attorney]'' (1501).

Fifteen to twenty minutes later the defendant returned (1501).

> "He stated that actually William Weissman was a fictitious name; and that actually it was a hooker that he knew, by the name of Margaret Foster" (1501).
>
> * * *
>
> "I asked him how this telephone came about. And he said that one day, going—in the month of September, he had been in the building on other business—
>
> "Q. What building? A. 406 East 63rd Street.
>
> "Q. Yes? A. And this Margaret Foster approached him in the building and asked him if she could use his name to obtain a telephone; obtaining a telephone was difficult for her.
>
> "Q. And what apartment was this phone to be for? A. This was for apartment 5-B.
>
> "Q. Go ahead. What else did he say? A. He stated that he done that. He gave her permission to use his name" (1502).

The defendant, however, disclaimed any physical or financial association with apartment 5-B (1502-3). Nor did he know a Gloria Kendal (1511).

> "I then told him that Detective Lyons and myself had been to the answering service of the deceased, and that 'you have already answered the question that you are Mr. Shore'. And that on September 27th, according to the deceased's answering service, and a message received there, a Mr. Shore called the deceased's answering service and left a number, TE 8-6171, which is the apartment 5-B and the phone."
>
> "Q. That was the telephone number for apartment 5-B? A. Yes. And the defendant stated that Billy

Tishman was also known as 'Mr. Shore'; and that as far as that apartment goes, that's his [Mr. Tishman's] apartment, and that was his broad, his girl; he had nothing to do with that apartment" (1504).

* * *

"He was shown a typewritten report where a Mr. Shore had called the deceased's answering service on September the 16th, I believe it was, and left a message there, to have the deceased call him at UN 1-4182" (1511).

"Q. What number was that listed? A. That was listed for 125 East 73rd Street.

"Q. Under whose name? A. Under the name of George [*sic*] Kendal.

"Q. Yes. What did the defendant say when you asked him? A. Well, the defendant said that Billy Tishman was Mr. Shore, and that [I should] ask Tishman about that" (1511).

Detective Leman also told of ascertaining the defendant's possession, on October 9, of a brown Chevrolet station wagon, bearing a license plate number, the last digits of which were "922" (1505-6). The defendant withheld replying for five or ten minutes, while he withdrew from the room with his attorney (1506). Upon returning, he said the only car it may have been was his brother-in-law's (1506). Upon being shown that that was unlikely, the defendant said he would "check his records; he doesn't know what car it was" (1506-7). Because he believed him unavailable, he declined to telephone his brother-in-law (1507).

[922 were the final three digits of the license plate registered to the brown Chevrolet station wagon rented by the

defendant on October 9 and 10, 1963 (1520). Company records showed that the vehicle was driven 12 miles on the first occasion, 33 miles on the second (1052, 1058)].

The defendant denied shooting the deceased, having him shot, or knowing who did it (1509).

Additional police investigation

After conversations with Mr. Tishman, Mr. Odell of the Alpine U-Drive Company, and people at a garage on 39th Street and Park Avenue, Detective **Leman** drove his car, in early March, past given, east side, mid-town points to 125th Street and Third Avenue, and back again (1548-9). The speedometer registered 12.1 miles (1549).

On March 21, 1964, Detective Leman, with Miss Boxer, Mrs. Lazarus and Mr. Broudy, drove from the Alpine U-Drive on 78th Street to the site of the murder at 63rd Street and then followed the path traced on the evening of October 10, 1963 (1546-8). The speedometer registered 32 miles (1548).

When the police searched apartment 5-B, they removed two floor boards from the living room (Exh. 91; 1538). These boards were microscopically examined by Detective **Kevin P. O'Brien** at the laboratory and three metallic fragments were found, two of which were shown to contain lead; the third was too small to be susceptible to chemical analysis (1724-5).

Appendix I

A chair that had been in the murder apartment on October 10, 1963, and subsequently placed in storage by Mrs. Lazarus, was also chemically analyzed. Several stains on the front part of the seat were tested, first by a police technician, Detective **Paschal Ungarino**, and then by **Eve Gordon**, a serologist in the employ of the Chief Medical Examiner of the City of New York (1702-3, 1710-12, 1716-18). Human blood was present, but not enough stain was available to discern the type (1719-20).

The Defense

To understand the first two witnesses appearing for the defense, it is necessary to know that during the cross-examination of Earl Roper (the prosecution witness who testified that as an employee of the Alpine U-Drive he gave the defendant a station wagon on October 10, 1963, between 6:30 and 6:40 p.m.), it was brought out that at about 11:15 a.m. on October 16, 1964, Mr. Roper delivered an automobile to Mr. Irving Fein, the defendant's father, at 79th Street and Madison Avenue (1008, 1010, 1012, 1015-16, 1085-6, 1097). Although he did not speak to him, the witness was certain that the defendant was with his father at that time (1096-7).

Roger T. Twitchell, sales and advertising manager of the Heisler Machine & Tool Company in Caldwell, New Jersey, met with the defendant and two associates at the witness' office on October 16, 1964 (1771-5). The defendant signed the visitors' book at 9:30 a.m. and remained with Mr. Twitchell until about 1:40 p.m. (1775-8).

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Pursuant to previous arrangements, **Marvin Schere** met with the defendant's father at 76th Street and Madison Avenue, just before 11:00 a.m. on October 16, 1964 (1781, 1783). The two men, and the defendant's wife, walked to a double-parked car three blocks to the north (1784-5). Mr. Irving Fein approached the driver of that car and conducted a brief transaction with him, consummated by the driver departing and Mr. Schere taking his place behind the wheel (1786). Mr. Schere, who "bore a resemblance" to the defendant, noticed the driver staring at him (1787, 1792). Mr. Schere did not obtain a station wagon from the Alpine U-Drive Corporation on October 10, 1963 (1794).

Mr. **Alvin Nierenberg**, an attorney who assisted defendant's counsel during the December 27, 1963, conference that took place between the defendant and the police, testified that when the interrogation turned to the defendant's explanation of the $12,000 loan borrowed with the assistance of Mr. Tishman, the defendant's attorney, Mr. Blinder, "said that he wanted to speak about the tax consequences of this, and this is when he said he would leave the room for a moment" (1796-7, 1799, 1803-5).

Mr. Nierenberg recalled the defendant again stepping out of the room with Mr. Blinder when queried about the name "Weissman" (1806). On return, Mr. Blinder announced that because the defendant was a married man "anything said at this point would be off the record" (1806). The police agreed to be as discreet as possible but said they "could not keep it off the record" (1806).

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> "They then asked Mark Fein what Weissman meant, and he said it was a fictitious name. They asked him to explain the name. He said the girl used it. He was asked if [she] was a hooker, and Mark said [she] was. They asked him if he rented the apartment for her, and he said no. They asked him if he allowed his name to be used as a reference for a telephone, and he said he did. They asked him if he furnished the apartment, and he said no. He said, 'Ask Billy Tishman. Tishman furnished the apartment. It's Billy Tishman's apartment and Tishman has the key' " (1807-8).

The defendant denied leasing, furnishing, having the key to, and paying the rent for, apartment 5-B (1818). Further, he claimed no knowledge of rental agent Donald Galka or a Gloria Kendal (1822, 1831).

Mr. Nierenberg, who arrived after the conference had begun, observed that the questioners interrupted one another, often while the defendant was in the process of answering; he said it was noisy and "there were a few heated words a few times" (1801-2, 1808-9).

Mr. Nierenberg remembered the defendant describing a $5,000 "hedge" bet on the World Series, adding that when asked " 'Did you bet with Richie?' Mark Fein said, 'I don't know. It could be. I just don't know. I would have to check the records' " (1813-14).

When the defendant was asked about a car he had used on October 9, 1963, bearing a license plate number ending 922,

"He stated he owned a white car, I believe it was a Cadillac. I am not sure. And that he had some trouble with the car, and therefore he used a different car. He stated he believed it was—he knows it was a station wagon. He believed it might have been his brother-in-law's, and he was very adamant about taking [*sic*] the color. He said it was either red, maroon or brown. And he said he would have to check his records to see which car it was.

"But he knew it was a station wagon, and he believed it was a red one, to the best of his recollection. And that was when there were questions thrown by Leman and questions by Lyons regarding the car.

"I don't know which officer was specific in their questions, but they asked him if—they told him, in fact, that his brother-in-law does not own this type of car.

"He said he doesn't know—he is not sure. But he knows he drove a station wagon that day, and he believed it to be red, maroon or brown.

"And this created an argument" (1833-4).

The defendant turned down the suggestion that he call his brother-in-law; "he didn't think he was available" (1836).

Albert A. Blinder, Esq., retained as counsel on the evening of November 8, 1963, testified to having met Mrs. Lazarus, with the defendant, at 2:45 p.m. on December 27, 1963, at the witness' office (1843, 1845-6). She was introduced as Gloria Kendal (1862). In a fifteen minute interview, Mrs. Lazarus told him of meeting with the police the week before, narrating on the subjects covered: the apartment of 406 East 63rd Street, the source of its furniture, Margaret Foster, the defendant, Mr. Shore, and

the need for silence regarding the police interrogation (1850-2). Mr. Blinder denied speaking to Mrs. Lazarus alone, and characterized Mr. Nierenberg's testimony to the contrary (1838-41) as error (1866-7).

Later that day Mr. Blinder held the previously described conference with the police at his office (1852). He recalled that the defendant had informed the police that the deceased was paid with (in addition to the April loan raised through Tishman ($12,000), the loan borrowed from Tishman ($2,500) and the hedge bet ($5,000)), money that "he had in the house" (1854). He recalled that the defendant said "It might have been [Richie]" with whom he placed the hedge bet (1871).

Mr. Blinder was unaware, at the time of the conference, that Gloria Kendal and Margaret Foster were one and the same (1859-60). Unlike Mr. Nierenberg, he did not remember the police questioning the defendant about Gloria Kendal (1863). Similarly, unlike his associate (1829), he did not remember the defendant indicating the existence of a personal relationship between Margaret Foster and Mr. Tishman (1876-7).

William J. Whelan, retired New York City Police Detective, First Grade, met and conversed with Mrs. Lazarus, over three drinks, at a mid-town Manhattan hotel on the evening of February 11, 1964, in his capacity as a private investigator for the defendant (1883-7, 1893).

> "She asked me if I had a love letter. I says, 'no, what do you mean by a love letter?' She said, 'Money'" (1888).

* * *

Continuing, Mrs. Lazarus informed Mr. Whelan that she had " 'told Mark that I had to leave all my clothes in the apartment. I can't contact any of my friends and I can't make any money.'

"So I said—I said, 'Why don't you get a lawyer? Go to the police and vindicate yourself.'

"So then she said, 'Well, I will get in touch with Mark Tuesday or Thursday or next week—Tuesday or Thursday of next week.'

" 'But, look,' she said, 'it is true that I have people close to me that have committed crimes of violence, but they paid for their acts. But if it ever comes down to a showdown, I am going to protect the ones that are dearest to me, not Mark Fein' " (1890-1).

Although equipped with an electronic recording device, the resulting tape "was incomplete and quite noisy" (1894-5).

A D.D.S. (Detective Division Form) made out by Sergeant **Ralph Serpico** was introduced into evidence (Exh. B, 1895-6, 1898). The report covered an interview by Officer Serpico with four friends and relatives of deceased on October 11, 1963; no notes were taken and the document had not been filled out until a month later (1897, 1901). In pertinent part, it reads:

" '2. Interrogation of the men revealed that they thought Rubin Markowitz had met with foul play due to his gambling losses and his owing of large amounts of money to unknown shylocks. Louis Markowitz stated that he thought Rubin perhaps was in the trunk of the deceased [*sic*]. No evidence of any foul play at this time and the auto was driven away by one of the men" (1899-1900).

It was not until he read it in the newspaper that the witness learned that the deceased was a bookmaker and not just a heavy bettor (1901-2).

Detective **Bernard Rosen** was first assigned to the case when the body of the deceased was found on November 8, 1963 (1903-4). On November 14, 1963, he interviewed Mr. Tishman (1905). He recalled that Mr. Tishman admitted betting with the deceased, but, in spite of express language in a report he made at the time, had no recollection that Mr. Tishman nominated Bill Markowitz as the man who introduced him (Mr. Tishman) to the deceased (1907-9). During cross-examination, the report of a conversation between the witness and Mr. Josephy was introduced (Exh. 27; 1911). The summary of the interview, which took place on the evening of October 11, 1963, records,

> "Subject did state that he did employ Ruby Markowitz as a grocery clerk and he did believe that he was engaged in bookmaking. He also did state that Ruby Markowitz was very prompt on appointments, and he did not believe that he was into Shylocks. Also when the deceased needed money, he would come to him."

Nancy Fein, the defendant's wife, lived with her husband, three children and two in help, in a $65,000 Park Avenue co-operative apartment (1913-16). In 1940 she inherited a "substantial sum of money" and "substantial amounts of securities" from her father's estate (1930). From time to time she lent the defendant securities, but never any money for a gambling debt (1930, 1947). On

occasion the defendant, of whose gambling activities she was generally aware, purchased securities in her name (1930, 1947-8).

On September 28, 1963, the Day of Atonement, she and the defendant were together, spending parts of the day, including the late afternoon, in synagogue (1926-8). She observed that by tradition Yom Kippur commenced at sundown of the previous day (1944).

Mrs. Fein noted that her children were usually fed between 6:00 and 6:30 p.m. and that the defendant had come home on October 9, 1963 while they were eating (1920, 1922). "It's his custom to come home at that time" (1932). She also recalled that her children were eating dinner the following night when the defendant came home (1922). "He's usually home for dinner, and he comes in and sees the children almost every evening when they are eating, unless something causes him to be out" (1932). She had no independent recollection when he came home on October 11th or 12th (1932-3).

At about 7:00 p.m. on October 10th, Bill Markowitz telephoned; the defendant then showering, she advised the caller to try again in fifteen minutes (1918-21).

At about 8:30 p.m. the defendant and his wife went to keep a dinner engagement which she had made, unbeknownst to him, earlier in the evening (1939).

On October 16, 1964, she met with her father-in-law and Mr. Schere and the three of them walked to an auto-

mobile parked at 79th Street and Madison Avenue (1924). She recalled that the driver, Mr. Roper, got out of the car after they arrived (1924, 1936).

The Post-Trial Testimony

Dagmar Finch Generazio testified that between 3:00 and 4:00 p.m. on October 10, 1963, while at Gail Weiner's apartment she received a telephone call from Mrs. Lazarus (2547, 2550).

> "She asked me for a car. She asked me whether I could get her a car. I said, 'No, I can't.'
>
> "She said, 'Well, how about Gail's car?'
>
> "I said, 'That's impossible.'
>
> "She again asked me, 'Well, how about anybody's car?'
>
> "I said, 'I can't do it.'
>
> "And she told me that she was nearby, and she had a heavy box to move" (2550-1).

While the witness had received other calls from Mrs. Lazarus, they were always at her own apartment, which was in the same building (2652-3). When asked how she fixed the hour of the call, Mrs. Generazio replied,

> "Well, first of all, when I had the phone in my hand, I was facing the window, and it was light outside. And in October it gets dark fairly early. And also Gail and I had a quarrel over the phone call right after the phone call. And Gail usually leaves about—gets ready to leave about 5:00, 5:30, and this was way before that. And I also recall I had watched television, the Early Show, which starts at 5:00 o'clock. And this call came way before that" (2551-2).

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In December, 1963, Dagmar Generazio met Mrs. Lazarus at the latter's apartment (2552-3). Informing the witness that she was leaving for St. Thomas shortly, Mrs. Lazarus said,

> " 'Well if you be my friend, if you stick with me, I'll give you something valuable, just as long as you would stick with me through anything' " (2553).

Dagmar Generazio did not know to what Mrs. Lazarus was referring (2553). The following month, while dining at Mrs. Generazio's, Mrs. Lazarus said,

> "if I would be her friend, if I would stick with her, she would treat me good, she would give me something valuable" (2553).

* * *

> "I told Gloria that whatever she had to give me, whatever she wanted, I didn't know why she wanted to give me something, that I didn't want any part of it" (2554).

Two days later Mrs. Generazio was arrested on a charge of prostitution and released on $175 bail (2554). It was apparently a frame-up (2554). Shortly thereafter she left the country, returning "about five and one half, six months" later (2554-6). She gave birth to a baby on August 25, 1964, and sometime afterwards notified the Probation Department of her return (2556-8). The following day Detectives Leman and Lyons arrived at her New Jersey home and questioned her in her husband's presence about Mrs. Lazarus (2558-60).

The detectives advised Mrs. Generazio that they knew she was telephoned by Mrs. Lazarus at Gail's apartment

(2565-6). She recounted the request for a car because Mrs. Lazarus "had a heavy box to move," and her refusal (2565-6). She told the police the call came between 3:00 and 4:00 p.m.

> "They said it was impossible, because they had a witness who could testify to the fact that this girl was with Gloria, that Gloria had made the call later on."
>
> * * *
>
> "* * * well, I kept insisting that it was three and four. So they dropped the subject, and they said:
>
> "Well, listen, we have a warrant for your arrest on your probation jumping. You know, we can arrest you at any time."
>
> * * *
>
> "They kept telling me to cooperate with them, and that they wouldn't arrest me; they would leave me alone; and that nobody could touch me, just as long as I would cooperate" (2567-8).

The next day an appointment was made to visit the District Attorney's Office (2570). The witness repeated to Assistant District Attorney Dermody the same story (2571-5). The questioning, from 9:00 or 9:30 a.m. to 5:00 or 5:30 p.m., centered on the issue of the telephone call, interspersed with warnings about the probation warrant and the importance of cooperating (2571, 2586). In spite of prompting from the detectives that Mrs. Lazarus sought a "trunk," Mrs. Generazio stuck to the noun "box" (2589).

Following this conference, the detectives and the witness were daily in telephone contact,

"* * * and we discussed the telephone call over the telephone, and especially the time. They kept insisting I was wrong, that it was later on, that it couldn't have been the time that I gave them" (2591-2).

A week later, Mrs. Generazio was brought to the prosecutor's office again (2593-4). Upon her willingness to confront Mrs. Lazarus, the latter was brought before the witness and Mrs. Generazio repeated her account of the telephone call (2594).

"After I had finished, Gloria—Gloria kept interrupting, and she was told to 'shut up', you know, so I could finish.

"After I had finished, Gloria jumps up, grabs the phone, and says, 'I'm not going to listen to this. You're trying to pin this on me. I am not going to say anything or listen to this until I call my lawyer—until I speak to my lawyer.'

"And Mr. Dermody grabbed the phone from her and said, 'Well, listen, we're not going to call anybody.' And he told her to shut up."

* * *

"She was screaming, I'd say, yelling.

"Q. And then she was taken out of the room. A. Yes, sir" (2594-5).

On each visit she was "pressured" and "threatened" with the arrest warrant if she did not change the hour of the call from between 3:00 and 4:00 p.m. to between 6:00 and 7:00 p.m. (2724-2728, 2805). The witness repeatedly "insisted upon that hour," but recalled that on the third visit, which was about a week and a half later, she "started to agree with [the 6:00 to 7:00 version] * * * a little bit" (2599, 2728, 2805).

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Mrs. Generazio was taken to the District Attorney's Office a fourth time, with her husband on this occasion (2601-2). This was the day of her trial on the prostitution charge. Detective Leman accompanied the witness to the Criminal Court and, after the trial at which she and her husband testified, she was convicted of the offense (2603, 2605). She received a suspended sentence (2606).

The detectives remained in daily contact with the witness and within ten days Mrs. Generazio once more visited the prosecutor's office (2606-7). She remained 3 to 4 hours (2608).

Other than the five days of her visits, she spoke to the police officers almost every day by telephone, who were attempting to ascertain that the telephone call was received between 6:00 p.m. and 7:00 p.m. on October 10th (2598-9, 2609).

Mrs. Generazio, who came to this country from Germany when she was eight years old, and, but for two return trips totalling less than three years, remained ever since, admitted to having formerly engaged in acts of lesbianism and prostitution (2543-5, 2622-34). On occasion during the second half of 1963, she partook in this activity at Mrs. Lazarus' apartment, "once" putting on a "show" for remuneration with another woman (2636-8, 2640). Although not presently living with her baby and husband, to whom she was married in March, 1963, or May, 1963, the witness noted,

"I never really left him and I never really left my child, either.

"Q. You're not— A. I'm here to rehabilitate myself. I have a job. You're endangering this all. What are you trying to do?

"Q. I'm trying to find out something about you, what makes you tick. That's what I'm trying to find out.

"Mr. Nizer: And I suggest that that is not the district attorney's mission, nor a fair one, nor a just one, in the interests of justice. I appeal to your Honor's discretion to put an end to this kind of an attack, instead of asking her about the truth of what she testified to, affecting the defendant in this case, where this woman has no interest in that matter whatsoever.

"The Court: All right, Counselor.

"Mr. Nizer: Your Honor, it places—May I say one further thing. Excuse me for raising my voice. It places a heavy responsibility on counsel. If that is what happens to a witness who may have some skeleton in her closet, I will not bring in witnesses into a courtroom. I think there ought to be some kind of atmosphere of concern for the protection of innocent people with respect to the testimony they give" (2540, 2547, 2642-4).

On cross-examination, Mrs. Generazio admitted that when she first spoke with Mr. Dermody at the District Attorney's Office, he requested that she recount the events of the day on which Mrs. Lazarus telephoned her; she told of being with Sandra Ede in Mrs. Lazarus' apartment during the afternoon, waiting for a date who never appeared, leaving there at 4:00 p.m., telephoning an air-

line pilot and later going to Gail Weiner's apartment, it being dark out when she arrived and the proprietor of an adjoining dry cleaning establishment preparing to close for the night; she thus fixed the hour as somewhere between 6:00 and 7:00 p.m. (2662, 2667-70, 2679-80, 2682-3, 2686, 2740).

The witness said repeatedly that she was "confused" when she gave this account, for the call came some two weeks after she had moved into Gail's apartment and the day she described to the prosecutor was before her move (2661, 2663, 2666, 2668, 2675). Mr. Generazio added that she informed the prosecutor of her error "the same day. I don't know how long after, but it was after I told you" (2770-1).

When she repeated her story to Gail Weiner (Tracy), at the prosecutor's office, Mrs. Tracy said, "'How can you do this to me?' * * *

"A. And she also said that her mother has heart trouble, she was very sick; she didn't want to get involved in it.

"And then she said that it was not true. It was after she made these statements.

"Q. But she told you it was not true, didn't she, that you never made the phone call or that the phone call never came in her apartment from Gloria Kendal? Didn't she tell you that right to your face? A. Yes. But then she admitted that she did have a phone call, that I received a phone call there.

"Q. Are you testifying that, in your presence, Gail Weiner admitted that you had received a phone call

from Gloria Kendal in her apartment? Is that your testimony? A. Yes, sir, it is" (2704-5).

When shown the defendant's photograph at the prosecutor's office, "I said I was not sure [if I]" knew him; at the hearing Mrs. Generazio was certain that she never saw him before (2688). In discussing the observation in her affidavit, which she herself dictated, of being "quite sure" that the photograph of the deceased represented a man whom she had seen in Mrs. Lazarus' apartment, Mrs. Generazio said that that meant she was "not sure" (2692-4, 2718). "To me it is one and the same answer. I am not sure. It is the same thing" (2697).

Mrs. Generazio, previously convicted of assault in the third degree, described the crime as follows:

> "I ran into this acquaintance of mine, a girl I knew slightly. I had met her about four or five times, and we took a walk.
>
> "The girl went up to a woman and pulled out a pistol. Later on I found out it wasn't loaded. She grabbed the bag which had seven dollars in it and started running. I ran with her" (2758).
>
> • • •
>
> "Q. As a matter of fact, Mrs. Generazio, didn't you turn over the seven dollars to the arresting police officer at the time you were apprehended?" (2758).
>
> • • •
>
> "A. I turned over money from my pocket, my money —nobody else's.

"Q. Didn't you tell the police officer at the time you turned over the seven dollars that this was the money that had been taken from this woman?

* * *

"A. The other girl was harassed by the police also. I couldn't sit there and watch this going on" (2759).

* * *

"The Court: Did you turn over any money to the police officer?

"The Witness: Yes, sir, I turned over money to the police officer" (2760; see pp. following).

Sergeant **Russell Generazio** corroborated, in essential detail, his wife's accounts to the police. Presently a career soldier, he re-enlisted in 1951 after "Having developed a guilt complex of using the G.I. Bill and not really having earned it" (216 B). Sergeant Generazio fixed May 22, 1963, as his marriage date and observed that three months later he and his wife commenced living apart, except for occasional weekend visits; in January, 1964, Mrs. Generazio travelled to Germany returning at the time of their first anniversary (219 B; 2460, 2496-8). A son was born on August 25, 1964, and a month later they contacted the New York City Probation Department (216 B, 2461).

When Detectives Leman and Lyons arrived, they announced they were investigating a murder.

"She said, 'I don't know anything about a murder case.'

"So he said, 'Well, don't you read the papers?'

"My wife said, 'No.' She said, 'I didn't read no papers over there. We don't get no papers from New York.'

"We notified the German police. We wanted to find out where you were. Didn't you get any notification over there?

"My wife didn't know what they were talking about" (2463-4).

Referring to a writ for violation of probation and concomitantly urging Mrs. Generazio to "cooperate", Detective Leman asked if she ever received a call from Gloria Kendal; Mrs. Generazio answered in the affirmative (2465, 2467).

"My wife said it was in early October. He wanted to know what time she got the call, and my wife said it was in the afternoon of October, this particular time. I don't recall the date. However, she did say it was in the afternoon" (2467-8).

* * *

"Gloria Kendal * * * wanted to know if my wife had anybody else who had a car. My wife said, 'No.'

"So the conversation took—the way she told the detectives—this conversation took a very urgent tone. This woman was talking very urgently like she needed it.

"So my wife had asked Gloria—when she told this to the Detective Leman—why she wanted a car. So Gloria said she had a heavy box to move, and then the conversation took another aspect at that time" (2469).

Upon receiving this explanation, the detectives returned to the subject of the arrest warrant, adding

"As long as you help us in this here case, and as long as you tell us what we want to know, well there is no sense in exercising the writ. We will just go along and give you a helping hand too" (2475).

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The witness accompanied his wife to the District Attorney's Office, and, although not permitted to be present during the interview, described his wife's distraught appearance after six hours of questioning and her unhappiness at being urged to change her story (2476-80).

Gail Weiner Tracy testified that she had lived at 412 East 64th Street for a year, when Dee, Mrs. Dagmar Generazio, moved in with her (3523, 3527). This occurred "a week or so" before the witness' October 13, 1963, birthday (3523, 3527). Mrs. Generazio received one phone call there during that October; Mrs. Tracy answered the telephone "right after I took my afternoon pills, which I take at 3 o'clock (3594, 3683).

The witness noted that she takes a phelantin pill and a dilantin pill every 9 a.m. and 9 p.m. and a dilantin alone at 3 p.m. (3600-1). In her affidavit she stated she knew the call came shortly after taking her dilantin and phelantin pills at 3 p.m. (468 B).

The caller identified herself as "Gloria" and Mrs. Tracy handed the phone to Mrs. Generazio; Mrs. Generazio was then heard to say, into the phone, "no, no, no" (3573, 3683). After she hung up, Mrs. Tracy asked who had called; Mrs. Generazio said, "nobody" (3583). Mrs. Tracy replied, that she "didn't want any of her friends to call" (3573).

In September, 1964, after speaking to detectives, Mrs. Tracy went to the District Attorney's Office where she said,

"it was impossible for her [Mrs. Generazio] to have ever received a phone call from anybody because she never was at my house then for six or seven months" (3530-1, 3533).

A few days later at the District Attorney's Office Mrs. Tracy was confronted with Mrs. Generazio who then stated that she had a conversation with Mrs. Lazarus by phone at Mrs. Tracy's apartment in October, 1963 (3535-6). Mrs. Tracy did not recall whether the hour of the call was mentioned (3548). Mrs. Tracy "called her a liar and * * * kept insisting that she was a liar" (3538). Mrs. Tracy never altered her story to the prosecutor, always denying the occurrence of a call (3541).

After meeting Mrs. Generazio on a train on October 13, 1964, Mrs. Tracy called the District Attorney's Office telling them that Mrs. Generazio had said, "I'm sorry I did this to you" (3559). She further testified that her reason for calling was because she, Mrs. Tracy, was "afraid" and "[she] wanted him [Mr. Dermody] to believe [her]" (3562). She denied telling the district attorney that Mrs. Generazio had admitted lying (3566).

In February or March, 1965, Mrs. Tracy, accompanied by her attorney, visited the District Attorney's Office where she was shown Mrs. Generazio's pre-hearing affidavit (3567-68). She stated at that time, "after all that I've been through, really I'm not sure anymore about the phone call" (3569).

One of the defendant's attorneys telephoned Mrs. Tracy shortly after midnight on Easter Sunday, April 18, 1965;

at her invitation they visited her some 30 minutes later (3579, 3582-4). Initially, she denied the receipt of a phone call from Mrs. Lazarus but after one to two hours she decided to tell "the truth" (3586, 3592). She "told him it came through right after I took my afternoon pills, which I take at 3 o'clock" (3594). The conference ended sometime after 3:30 a.m. (3603).

On the evening of that same Sunday Mrs. Tracy and her husband went to the office of the defendant's attorney (3607). Mr. Tracy noticed a bulge in one of the lawyer's pockets and, believing it to be caused by a tape recorder, got angry and the two left (3609, 3611).

The next day, Monday, April 19, Mrs. Tracy called the District Attorney's Office and told them that one of the defendant's attorneys "had offered us money to leave town" and advised that if she were out of the state "a subpoena wouldn't mean a damn thing" (3615-18). She added that when she had met Mrs. Generazio on the train, the previous October 13, Mrs. Generazio told her that "she was being bribed" (3558, 3616).

Mrs. Tracy stated that there was no truth to her charges (3620).

When the trial assistant called her later in the day on Monday the 18th, he advised that he was going to subpoena her as a witness at the hearing the following day; she "took her husband's and [her] toothbrush and [she] left the house" (3624, 3628). That same night she and her

husband registered under pseudonyms at a mid-town hotel (3631).

On Tuesday, April 20, Mrs. Tracy telephoned the defendant's lawyers and told him of her conversation with the assistant district attorney (3632-3, 3635-6). The attorney did not ask her where he could reach her, nor did Mrs. Tracy tell him; there was no discussion about any further communications (3636, 3679). On Wednesday, April 21st, the prosecutor told the court in the presence of the defendant of his inability to locate Mrs. Tracy (3514-16). The defense representatives said nothing (3516).

Mrs. Tracy again called the defendant's attorney on Thursday the 22nd and was told that the hearing was over (3638). That afternoon she signed an affidavit for him (3651). At the same time Mrs. Tracy was directed to another attorney for assistance with her own pending action for 102 unpaid traffic tickets, which had apparently been accumulated when she "lent her car out" (3551, 3645, 3649).

Mrs. Tracy owned a Thunderbird in October, 1963, her second; before that she had a "couple of Cadillacs" which were gifts from her father, she herself having no job at that time (3524-5, 3552-5).

The witness was not certain what her husband's job was in September, 1964, but remembered that they were so short of funds that she and her husband-to-be borrowed carfare on leaving the prosecutor's office (3674-7). Mrs. Tracy did not recall where she was living in September,

1964 (3677). She could not recall what hour, the previous day, she met with defense counsel at his office, or if she had met with him at all on Monday, three days earlier (3668-71).

William J. Whelan, presently a private investigator after having served for 35 years as a member of the New York City Police Department, testified that he was employed by the law office of Saxe, Bacon and O'Shea (2908-9). Mr. Blinder, one of defendant's lawyers, was a partner in the firm (2910). Mr. Whelan stated that he was aware of a woman named Dee since sometime during September, 1964; within the month thereafter he learned that her first name was Dagmar and during the trial ascertained that her last name was Finch (2911). He did not know Dagmar Finch's married name, Generazio, until after the trial (2945). He had obtained information that on the day of the murder Mrs. Lazarus had telephoned Dagmar Finch to borrow a car (2914, 2928). He also learned that Dagmar Finch had been down to the District Attorney's Office (2914, 2955). Mr. Whelan gave this information to the defendant's attorney while the trial was still in progress (2917-9).

Upon Mr. Whelan's inquiring if Dagmar Finch was to be called as a witness, Detective Leman answered that "he didn't know" (2918, 2930). When Detective Leman then asked Mr. Whelan if he had called Dagmar Finch's mother in Baltimore the witness replied "I don't know her mother. I don't even know the phone number" (2930). "I asked him for the telephone number, but I didn't expect he would

give it to me. In fact he says, 'I'm not at liberty to give it to you' " (2930). Mr. Whelan stated that he didn't know whether the defendant's attorneys had asked the District Attorney's Office to turn over Dagmar Finch's name and address (2938-9). The witness made no effort to obtain the phone number from any member of the prosecution staff (2948).

Sandra Ede testified that part of her job was to answer Mrs. Lazarus' phone and take messages (3158, 3181). "Around" October 10th, she went there as often as possible, but did not remember whether she was in Mrs. Lazarus' apartment on that particular day (3165, 3167). When asked "do you have any recollection one way or the other of speaking to Geri Boxer on the intercom sometime in October of 1963," she replied, "No, I don't remember speaking to Geri on the intercom" (3156).

> "Q. Do you say that that never happened? A. I say I am not sure. I don't remember" (3157).

Later she averred, "I would never give a message over the intercom" (3229).

At yet another point, the following colloquy occurred:

> "The Court: When Gloria spoke to you on the intercom, didn't you talk to her?
>
> "The Witness: We wouldn't hold a conversation. I mean usually it was just to buzz, the signals of buzzing" (3178).

In a pre-hearing Q. and A. she was asked, "Did Geri Boxer call you at any time on October 10th, 1963 on the

intercom at 125 East 73rd Street apartment?''; she answered, ''positively not'' (183 B). At the hearing she stated, ''It couldn't have been positively not, because I wasn't sure. I meant positively I didn't give any message over the intercom. That's what I meant. In other words, I would never talk over the intercom'' (3225).

Miss Ede also denied ever giving a message to Miss Boxer which directed that Mrs. Lazarus could be found at the ''Weissman'' apartment (3150-1).

In March, 1964, Miss Ede was questioned in the presence of her lawyer by Assistant District Attorney Herman (3168-9). At that time she told him, ''I wouldn't hold a conversation over the intercom. But actually speaking [to] her [Geri Boxer], I don't remember'' (3176). When asked if she received a call from the defendant on October 10, 1963, she replied, ''I don't remember talking to Mark Fein, getting such a message like that'' (3183-4).

> ''Q. When you say 'I don't remember anything like that happening,' does that mean you have no recollection or does it mean it did not happen? A. No, I don't have any recollection of anything like that happening'' (3185).

When advised at the prosecutor's office that she had a phone installed in her Riverdale apartment on October 10, Miss Ede recalled that this occurred in the afternoon because ''[I] couldn't get over there in the morning''; as a result of installation difficulties the installer left ''sometime late in the afternoon. I don't remember exactly''

(3160, 3163). The witness had no independent recollection of the phone being installed (3162). When asked if she had previously specified the installation time to be between the hours of two and five, she replied, "Maybe, I did" (3164).

> "Q. Well, was that correct? A. Well, sometime in the afternoon" (3164).
>
> "* * * I didn't see how I could get from Riverdale to Gloria's apartment because I wasn't familiar with the transportation service" (3164).

She was not sure if the installation was 2:00 p.m. or 5:00 p.m. (3183). She did not deny that she was present in Mrs. Lazarus' apartment in the late afternoon of October 10, 1963 (3164-6, 3190).

On her second visit to the District Attorney's Office, again accompanied by her lawyer, Miss Ede was confronted by Miss Boxer's account of "three different stories" of how she received the message (on the phone, on the intercom, and handed on a piece of paper) (3198-99, 3201). Miss Ede told Miss Boxer, " 'I don't remember any of these things, you know but I don't want to call you a liar.' I said I don't know" (3198-9, 3201-2).

On her third visit to the District Attorney's Office on October 29, 1964 Miss Ede saw Mr. Herman again and repeatedly said "that I didn't remember" (3208-9).

In November, 1963, Miss Ede was in an automobile accident and as a result "was upset straight along. I just wasn't feeling good" (3153, 3172). She was admitted to

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Bronx Municipal Hospital on November 24, 1964 (the day after the defense summed up at the trial), for psychiatric care and remained so confined until February, 1965 (1956, 3154, 3212-13). When asked by defendant's attorney "Did they [District Attorney] tell you that they would take you to a Grand Jury if you don't make a statement?" she replied, "Yes, but so did you" (3151-2). Some two months after being hospitalized she was told by her doctor that the defense wished to question her (3212). Upon his advice she gave a stenographic statement to the defendant's attorney, "I just was scared of the subpoena" (3220-1, 3224).

Mrs. **Yvonne Bennett** testified that since July, 1963, she lived in a back apartment at 406 East 63rd Street (2822-3). The defendant's apartment faced the front of that building, on the fifth floor (2827). Speaking of herself, her mother, and her young daughter, the witness recalled,

> "[w]e had, more or less, the same schedule every day, and if the weather permitted, we would do the same thing every day, go to the park with my little girl up until 4:00 we arrive home. That would be our timing. And we had arrived home, sometime—it was Indian summer, I remember—and I was telling her the story of Snow White after, you know, we had washed her up.
>
> "I happened to be looking in the mirror. I was saying, 'Mirror, Mirror, on the wall', when all of a sudden, to the right of me, I heard a series of shots. I turned to my mother and said, 'Mom, those were shots,' because where we used to live there was a de-

> tective that lived next door or something—familiar with shots. But anyone would know shots because they are different, sharp'' (2828-29).

When asked if she could fix the date in the latter part of September Mrs. Bennett replied, ''I don't remember'' * * * Well, everyone places it in October the 10th, so I read [in] the papers'' (2862-3). The shots appeared to come from the garden in the rear of the building (2829). Without specifying when, Mrs. Bennett also recalled seeing a black trunk on two separate occasions in the lobby, ''once on the left side as you enter the elevator and then on the other side the following day'' (2833-4, 2855). The witness remembered the trunk was solid black; her affidavit trimmed it with ''gold or brass'' (2852, 2854).

> ''I may have gone along with mother and said, 'Yes, it was a gold trim,' because I'm not that detailed, really'' (2854).

''Sort of in the middlish'' of February, 1964, when questioned by Detectives Leman and Lyons, Mrs. Bennett told of hearing shots in the rear of her apartment and seeing a trunk; they advised ''please don't talk about this to anyone'' and specifically, ''don't mention it to Mr. Kassow'' (2831-3, 2866, 2892-3). At that time she was aware of the defendant's arrest for a shooting that occurred in her building (2868, 2878). In her affidavit Mrs. Bennett mentioned only one visit from the police, ''sometime in the summer of 1964'' (245 B). She explained that this referred to another visit, ''I would say around Mayish, they came back the second time'' (2867).

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Despite the admonition from the detectives in February, Mrs. Bennett told Mr. Kassow, a social friend and defendant's attorney of record, about the trunk, but not about the shots (2868, 2894). Realizing that she had been warned by the detectives not to speak to anyone, the witness explained how she happened to tell Mr. Kassow about the trunk.

> "We were having dinner, and it was brought up. Actually, I'm also afraid of him. I'm afraid of any man I go out with. I'm very shy or quiet and I'm not about to discuss things like that with him, you know —it's not my type of person. We really didn't—We discussed, you know—the weather, and we discussed theater and things like this. And when he did bring it up, I said, 'Well, yes, the trunk.' And I kept quiet about the shots" (2889-90).

In September, 1964, the witness informed Assistant District Attorney Dermody, while at his office, that she had mentioned the trunk to Mr. Kassow; she did not tell the trial assistant that she had talked about the shots (2837, 2841, 2888-9). She denied ever telling the detectives or the trial assistant that the shots came from upstairs and towards the front of the building (2879-81).

Mrs. **Vera McNair** lived with her daughter, Mrs. Yvonne Bennett, and her four and one-half-year-old granddaughter, during the summer and fall of 1963 (3071-3). The witness stated that she heard "four fast shots" on a day that "seemed like it was Thursday or toward the end of the week" (3083, 3126). "[I]t could have been the beginning of October" (3085). When asked if it could

have been the end of September when she heard the shots she replied, "No, I don't think so, because the weather, it was favorable and then it started getting chilly, started getting very chilly" (3086). "September was very nice, but in October starts getting very chilly. That's how I recall" (3086).

The witness stated that the shots "came from down below, and toward the alleyway," that she had "immediately" gone to the window, but did not see anything (3091-92). She knew they were shots because

> "We used to live next door to a man connected with the Police Department, and we were sitting in our living room and we heard, once or twice, a big blast from a gun.
>
> "Q. A big blast from a gun, you heard? A. Yes, because I guess he was in the basement of his house.
>
> "Q. You guess? A. Well, I wouldn't go and ask the man if it was, and it would not have been anything else. It was a gun blast. It couldn't be no explosion.
>
> "Q. Well, did you see this detective actually firing the gun? A. No, I didn't.
>
> "Q. You heard some loud sounds. A. Yes, yes.
>
> "Q. That, in your opinion, were shots. A. Yes.
>
> "Q. Is that right? A. Yes.
>
> "Q. Had you ever heard in your lifetime the sounds of a backfire? A. Oh, yes.
>
> "Q. Firecrackers? A. Oh, yes.
>
> "Q. You say this was not the kind of sounds you heard. A. Oh, no, no. It's a different sound" (3127-8).

No effort was made by her to notify the superintendent of the building or the police; "we thought if we looked

and then it wasn't our concern in a way—we wouldn't know where it came from" (3095).

The witness remembers seeing "a very large," "shiny and new" black trunk, which "may have had gold trimming on it" at the end of September or the beginning of October, but could not recall whether it was before or after she heard the series of shots (3096, 3098-9).

In February, 1964, detectives visited the witness at her apartment; when she told of the shots and the trunk, they advised "don't talk to anyone" (3129). Mrs. McNair was visited again by detectives in May (3111). Her affidavit also referred to only one visit by the police, "sometime in the summer of 1964" (3110).

In the course of the May visit the witness heard her daughter mention that she knew Mr. Kassow (3119-20). She did not hear her daughter inform the police of having told Mr. Kassow about the trunk or the shots, and she never said otherwise to Mr. Dermody (3119-21). Nor did she ever tell Mr. Dermody that the shots came from "upstairs and toward the front" (3126).

Saul Kassow testified that until the start of the trial below he was defendant's counsel (2958, 2962). He had seen Mrs. Bennett socially from August or September, 1963 until May, 1964 (2959, 2970). Sometime during the winter of 1964, Mr. Kassow learned that tenants of the building had been questioned by detectives (2971, 2973). Mr. Kassow asked Mrs. Bennett "if she knew anything

about the case; did she see or hear anything around that time, in the beginning of October (2973-4). Mrs. Bennett said she wasn't able to talk to him "because the policemen told me not to talk to anybody."

> "I said, 'Well, did they tell you not to talk to me?'
> "She said 'Yes.'
> "I said, 'How did my name come into the conversation?'
> "Q. What did she say? A. She was very vague" (2977-78).

The witness questioned Mrs. Bennett extensively but "the only information that [he] could get out of her at that time was the fact that she had seen the trunk" (2984). She described the trunk as black, and placed its appearance by her elevator "about the beginning of October" (2981). When he asked her about hearing shots Mrs. Bennett said " 'no,' she hadn't heard anything" (2989).

Albert A. Blinder, one of the trial counselors for defendant, testified that during the trial, he was told "by Mr. Whelan, my investigator, that there was a witness who claimed that she had received a telephone call from [Mrs. Lazarus] to borrow a car" (3003-4). Before the trial was over he knew that the caller, Dee, was Dagmar Finch and that she had been to the District Attorney's Office and had told them of receiving a telephone call from Mrs. Lazarus on October 10, 1963, in an attempt to borrow a car (3018-19). When the prosecution rested at the trial below, Mr. Blinder knew that Dagmar Finch would not be called as a witness; at no time did he ask anyone connected with the prosecution to supply her address so that he could question

her and possibly call her himself (3026-27). Mr. Blinder did not learn of Miss Finch's married name, Mrs. Generazio, until after the trial (3003).

Mr. Blinder knew of Sandra Ede several months prior to trial, and of her importance in the case, but did not interview her even after being given her address (3029-30, 3033, 3045).

Mr. Blinder testified that he was advised by attorney of record Saul Kassow, "sometime within a few weeks after the defendant's arrest, that some young lady he knew socially in the building at 63rd Street had seen a trunk"; the witness did not "recall any conversation about shots with Mr. Kassow" (3010-11, 3028).

Vincent J. Dermody, an assistant district attorney for over twenty years and trial prosecutor in the case at bar, testified that on September 23, 1964, he spoke to Dagmar Generazio in the company of Detectives Leman and Lyons (3342-3). She told him that while at Gail Weiner Tracy's apartment she had received a phone call from Mrs. Lazarus sometime in the latter part of September or early October and placed the time by inquiring "could it have been around 8 or 9 o'clock?" (3344-5, 3352). In an effort to fix the hour more precisely, Mrs. Generazio then traced the events of the day: she recalled going to Mrs. Lazarus' apartment at 2:00 p.m. and waiting in vain until 4:00 p.m. for a man to show up; Sandra was there (3345-6). She left the apartment and spent a couple of hours entertaining an airline pilot (3346-7). Then she went to Gail

Tracy's apartment; the telephone call occurred "sometime after seven o'clock possibly between six and seven; but I am not sure. * * * All I know is that it was dark out, and when I entered the building the dry cleaning man was getting ready to close his store" (3347-9). She never retracted this account of her activities, or claimed confusion (3360).

When the telephone rang, Gail Tracy answered it, and, advising that it was "Gloria", handed the phone to Mrs. Generazio (3348). Mrs. Lazarus asked to borrow a car; Mrs. Generazio replied that she didn't know of any car she could borrow (3348). Mrs. Lazarus asked if she could use Gail's; Mrs. Generazio said that that would be "impossible" (3348). Mrs. Generazio did not recall Mrs. Lazarus telling her why she wanted to borrow a car (3349).

When shown a picture of the deceased she couldn't tell whether she had seen him before (3350). She identified a picture of the defendant as a man named "Mark" whom she had entertained sexually at Mrs. Lazarus' apartment (3350-1). Mrs. Generazio also gave the details of her involvement with "the law" (3351-2).

On a second visit to the District Attorney's Office Mrs. Generazio recalled that Mrs. Lazarus asked to borrow a car in order to move a box (3355). She then confronted Gail Weiner Tracy with her story of receiving a phone call at her house "sometime after or between 6:00 p.m. and 7:00 p.m. (3357). Before she could finish, Mrs. Tracy called her a liar, saying she never received a call on her phone from

Mrs. Lazarus at any time (3357). Mrs. Tracy never retracted this denial (3384). After Mrs. Tracy left the room, Mrs. Generazio said, "I am telling the truth * * * It had to be some time between 6:00 or 7:00, or even possibly later" (3358). Mrs. Generazio never indicated that she received the telephone call between 3:00 p.m. and 4:00 p.m. (3359-60). Throughout she seemed anxious and willing to tell Mr. Dermody what she thought he wanted to hear (3460).

Although Mr. Dermody "pressed" Mrs. Generazio as to the reason she violated her probation and went to Germany, she "assured" him that it had nothing to do with the defendant's case (3355-6).

On her third visit, September 28, 1964, Mrs. Generazio again assured the assistant district attorney that the late September or early October telephone call came between 6:00 p.m. and 7:00 p.m., "or even possibly later" (3360-1, 3499). When confronted with Mrs. Lazarus she repeated her story about the receipt of the phone call from her (2362). Mrs. Lazarus called her "a goddamn liar" and started to shout demanding the opportunity to call her lawyer, which was granted(3362-3). Mrs. Generazio was taken out of the room (3363). Later on the same day, Mrs. Lazarus recanted (3508). That was the last time Mr. Dermody spoke to Mrs. Generazio about the case; he never advised her not to talk to any defense lawyers (3364).

He met Mrs. Generazio on one subsequent occasion in the sixth floor waiting room of the District Attorney's

Office; she was about to meet Detective Leman on a matter not related to the present case (3363-4).

During the trial Mr. Whelan told Detective Leman that the defense knew that Dagmar Finch had been to the prosecutor's office for questioning about receiving a call from Mrs. Lazarus in connection with borrowing a car; Detective Leman so advised Mr. Dermody (3384-5). Mr. Dermody did not, however, know that the defense was trying to locate her (3469-70). Had they inquired of him, he would have given her full name and address (3470).

Mr. Dermody questioned Mrs. McNair in the latter part of September, 1964 (3365). She stated that sometime during "Indian Summer," from the middle of September, to middle of October, "she and her daughter had occasion to see [a new black] trunk in the lobby of her building" (3365-6). During that period she also heard "what sounded like" shots. "It could have been four or five" (3366-7). "They seemed to come from upstairs, towards the front of the building;" she added emphasis by pointing forward and upward (3367). Mrs. McNair told him that she, as well as her daughter, had mentioned the shots and trunk to Mr. Kassow (3368, 3414). Before she left, Mrs. McNair was advised not to gossip with her neighbors (3369). She was never told not to talk to defendant's lawyer (3369).

A few days later the witness saw Mrs. Bennett, who repeated her mother's account, to wit: that "sometime during Indian Summer" she saw a trunk in the building and heard a series of shots that came from upstairs and towards the front of the building (3370). She said that

she had told Mr. Kassow about the shots and trunk (3371). Mr. Kassow had shrugged his shoulders and advised, "Just tell the truth" (3371) She too was informed not to gossip with neighbors, but never directed to avoid talking to the defendant's lawyer about her observations (3371-2).

Mr. Dermody on one occasion spoke with Sandra Ede and her lawyer; it was in September, 1964 (3373). She told of knowing Mrs. Lazarus for several months and of entertaining men and taking phone messages at Mrs. Lazarus' apartment (3373). She had no specific recollection of being in Mrs. Lazarus' apartment on October 10, 1963, nor of talking to the defendant over the phone on that date, nor could she recall one way or the other speaking on the intercom with Geri Boxer on that date (3373-5). She had no recollection that a phone had been installed in her apartment on October 10, 1963, but noted that "if it was on October 10, 1963, and it was installed in the afternoon, I don't see how I could be in [Mrs. Lazarus'] apartment" (3379). When asked what time the phone was installed she replied, "I honestly can't recall. I don't know. I have no recollection one way or the other" (3379).

Upon being confronted by Miss Boxer and her account of receiving a message over the intercom from Miss Ede directing her to go to the Weissman apartment on 64th Street, Miss Ede's attorney asked if Miss Boxer could be mistaken (3376-7). Miss Boxer replied "I know Sandra's voice. I have spoken to her on many occasions. It was Sandra" (3378). At that point Miss Ede said, "Geri, I'm not calling you a liar. I'm not saying this didn't happen.

I just have no recollection. I honestly don't remember" (3378). At no time did Miss Ede advise that she was not in Mrs. Lazarus' apartment on October 10, 1963, that she didn't talk to the defendant on October 10, 1963, or that she didn't speak over the intercom to Geri Boxer (3380-1).

Detective **James Leman** testified that on September 28, 1964, he and another officer visited Dagmar Finch Generazio at her New Jersey home (2298-9). In the presence of her husband, Mrs. Generazio advised that Gloria Kendal (Mrs. Lazarus) had telephoned seeking to borrow her car, and failing that, the use of the car belonging to her then roommate, Gail Weiner Tracy (2300-2, 2370). Both of Mrs. Lazarus' requests were refused (2302).

Mrs. Generazio was unable to fix the exact date of the call, placing it "near the end of the summer or the beginning of the fall", 1963 (2302-4). It occurred when "She was just starting to move in [to Gail's] * * * apartment" (2370-1). When shown a photograph of the deceased, she denied recognition (2306-7).

A few days after this visit, Mrs. Generazio in conversation with Detective Leman advised that Mrs. Lazarus had wanted "the car to move a box" (2374, 2376). During two subsequent interviews at the District Attorney's Office (she came to the building on two or three other occasions for other purposes), Mrs. Generazio alternately fixed the hour of the call "Maybe it was eight o'clock or nine o'clock," and, "after six and close to seven p.m." (2315-16, 2372, 2431).

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When Mrs. Generazio repeated her story to Mrs. Lazarus at the prosecutor's office, the latter denied it, became very angry and commenced screaming (2326, 2330). She was directed to calm down and permitted to call her lawyer (2326-8). Thereafter, both Detective Leman and Mrs. Generazio left the office (2328).

On a different occasion, Mrs. Generazio met Gail Weiner Tracy at the prosecutor's office; Mrs. Generazio's account of the call made her "very excited" (2378-80).

At no time did Mrs. Generazio ever fix the hour of the telephone call as occurring between 3:00 and 4:00 p.m. (2372). Although advised to keep in touch with the prosecution if anyone from the defense contacted her, Mrs. Generazio was not told she must not talk to such representative (2322-3). During October, 1964, the witness called Mrs. Generazio "about five times" always from the prosecutor's office; she, at his request, called him on an equal number of occasions (2320-1, 2349). The telephone records of the District Attorney's Office, subpoenaed by the defense, showed five calls to Mrs. Generazio between September 22, and November 30, 1964 (2746-9).

Detective Leman testified that he spoke to Sandra Ede on five different occasions (2399-2400).

The first visit, in January, 1964, consisted of a fifteen minute conversation in the detective's automobile (2354, 2401).

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In March, 1964, the witness and Mrs. Lazarus met Miss Ede in a restaurant near her home to try and refresh her memory as to the events of October 10, 1963 (2355, 2401-2). At that time Miss Ede could not remember one way or the other about being in Mrs. Lazarus' apartment on October 10, 1963 (2401).

Detective Leman's June visit to Miss Ede, at her newsstand at the Chatham Hotel, was fruitless; she refused to talk to him (2354, 2403-4).

In August, 1964, the witness spoke with Miss Ede and her lawyer in Mr. Dermody's office (2404-5). Miss Ede stated that she answered phones and worked as a prostitute for Mrs. Lazarus; she also knew the defendant (2405-6). She could not remember the defendant telephoning on October 10, as she received many calls from him (2410). She also did not recall giving a message to Geri Boxer over the intercom, because "they gave a lot of messages to people over the intercom" (2411). She did not remember the name Weissman (2423).

In reference to her being advised that a telephone was installed at her Riverdale apartment on October 10, Detective Leman testified, "she said that she had been thinking about this, and if it was the day her phone was installed, she thinks it was in the afternoon. And if it was installed in the afternoon, she wouldn't have been in Gloria's apartment to receive this call" (2359, 2413).

On October 29, 1964, Miss Ede, again accompanied by her lawyer, was questioned by Assistant District Attorney

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Herman in Detective Leman's presence (2400, 2415-16). At that time Miss Ede could not remember "one way or the other" being in Mrs. Lazarus' apartment on October 10, 1963 (2417-18). She never denied giving a message to Miss Boxer, nor being left such a message by Mrs. Lazarus (2419). "She just could not remember" (2419).

Detective Leman visited Mrs. McNair and Mrs. Bennett on three different occasions: December, 1963, March, 1964, and August, 1964 (2333-4).

On his December visit, the witness, accompanied by Detective Gilmore, asked the two women "Did anything unusual happen in the month of October?"; they answered, "No" (2335, 2383-4). Neither of them mentioned seeing a trunk or hearing shots (2386). The visit took five to ten minutes (2439).

The witness revisited Mrs. McNair and Mrs. Bennett the following March (2386). They told of seeing a trunk in the lower hallway for some 24 hours and of hearing a series of gun shots "about five, five-thirty" p.m. during the month of October (2344, 2387). After hearing the shots they looked out the window and also looked out the door leading into the hall (2391). When asked what direction the shots came from, "they both pointed towards the front of the building and up" (2388). Mrs. McNair and Mrs. Bennett added that they had told Mr. Kassow about the shots and the trunk (2393).

Detective Leman advised the women not to discuss the case with others (2349-50).

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Assistant District Attorney Dermody interviewed Mrs. Bennett in Detective Leman's presence; she repeated that "the shots seemed to come from upstairs and towards the front of the building" (2395). She told of advising Mr. Kassow about hearing the shots and seeing the trunk (2395). Neither of the women ever claimed that the shots came from any other direction (2397-8).

Alexander Herman, an assistant district attorney for twenty-seven years and presently in charge of the Homicide Bureau, testified that he spoke to Sandra Ede and her attorney in March, 1964 (3277-8). Miss Ede, a prostitute, assisted Mrs. Lazarus by answering the telephone and taking messages at Mrs. Lazarus' apartment, commencing "regularly" at 4:00 p.m. (3279-80). Miss Ede had no recollection of speaking to the defendant on the telephone at Mrs. Lazarus' apartment nor had she any recollection "one way or the other" of speaking to Geri Boxer over the intercom on October 10, 1963 (3281-2). Advised that her own telephone was installed on October 10, Miss Ede did not recall during which part of the day this had occurred; she observed that if the installation were in the afternoon "it was likely" that she did not go to Mrs. Lazarus' apartment that day (3282-3).

Mr. Herman saw Miss Ede and her attorney on a second occasion, October 29, 1964 (3284). A conversation of an hour's duration between Miss Ede and Mr. Herman ensued; no notes were taken (3298). "She was very upset, emotionally involved with her own affairs. Most of the time I was listening to her and letting her run off at

the mouth until she had finished telling me about her own problems, and then I would ask her a question here and there as I could " (3303). When "pressed" about her recollections of October 10, Miss Ede replied "I have none. I don't remember. I don't remember" (3285). Questions directed at Miss Ede's use of an intercom to relay a message to Geri Boxer "always" brought the same response, "I can't remember" (3286-8). Miss Ede never denied that she had a conversation with Geri Boxer over the intercom, but merely had "no recollection one way or the other" (3287, 3320). A Q. and A. was then stenographically recorded which summarized Miss Ede's total account (3287, 3299, 189 B-196 B). Her attorney was given a copy (3287).

No notes were taken of the conference; "I couldn't because it was all negative. There was nothing to take notes about" (3298).

> "Q. At any time, Mr. Herman, in your presence on October the 29th did Sandra Ede tell you that she had never, not only on October the 10th, 1963, but at any time, did she ever tell you that she had never given any messages to anybody on the intercom?
>
> "A. No" (3288). (See also 3320.)

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IN THE

Supreme Court of the United States

October Term, 1968

No. 1280

UNITED STATES OF AMERICA, *ex rel.* MARK FEIN,
Petitioner,

against

JOHN T. DEEGAN, as Warden of Sing Sing Prison,
State of New York,
Respondent.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Respondent persists in making intellectually dishonest as well as deceptive statements in order to sustain an unconstitutional and illegal judgment of conviction. Four examples from respondent's brief in opposition in this Court will document the point.

Respondent's untrue statement that petitioner's counsel during oral argument in the Second Circuit conceded that petitioner's fifth point that the trial judge violated petitioner's right of silence had been irrevocably waived.

Respondent in its brief (p. 54) falsely gives the impression that counsel conceded during oral argument in the United States Court of Appeals for the Second Circuit that the petitioner's fifth point, namely, that the trial judge's statement to the jury violated the petitioner's right of silence under the Fifth and Fourteenth Amendment "had been irrevocably waived." This is not a fact, as this excerpt from the oral argument before the Second Circuit (only part of which respondent quoted) demonstrates:

> True, there was a federal statute involved in *Bruno,* but these decisions have a way of becoming the constitutional law, and I think that they violated his Fifth Amendment right and there wasn't anything that could have been done to cure it except a new trial.
>
> I will make one comment on the prejudical publicity.
>
> Judge Feinberg: Before you get to that, the D.A. says the Judge said this in his final charge to the jury and that no one objected.
>
> Mr. Rogge: There was not an objection. I don't think this can be cured. You are right. There wasn't an objection. [Mr. Rogge's point was that the trial judge's violations of petitioner's Fifth Amendment right of silence could not be cured, objection or no objection.] (Excerpted from p. 46 of minutes of oral argument.)

What was said, and what was the clear intent of what was said, as anyone who was present (as Mr. Eric A. Seiff, who helped write the respondent's brief, was) knew, was that the trial judge's violations of the petitioner's privilege against self-incrimination under the Fifth and Fourteenth Amendments could not be cured in any way except by the granting of a new trial. Yet the respondent tries to twist counsel's words to mean just the opposite of what counsel said as well as the meaning thereof. Respondent then feigns to find it "difficult to understand how the petitioner can now challenge the charge" (p. 54).

Respondent's untrue statement that petitioner "knowingly waived" his illegal search and seizure point.

Respondent makes the untrue statement in a heading in its brief (p. 42), as well as in the argument under this heading, that petitioner "knowingly waived" his third point, namely, that the admission into evidence over objection and without a hearing of a chair obtained as a result of an illegal search and seizure violated his Fourth and Fifteenth Amendment rights. What actually happened, as the petitioner narrated in his petition (pp. 35-36), was this. Under sandbagging by the trial judge, and the withdrawal by the prosecutor of his offer into evidence of the illegally seized chair, as well as the trial judge's grudging agreement to hold a hearing when the issue next arose, the issue was postponed (pp. 388-593). Eight days later, when the prosecutor again offered the chair, and defense counsel respectfully reminded the trial judge of the judge's agree-

ment to hold a hearing, the trial judge summarily and without a hearing denied defense counsel's motion to suppress (pp. 1193-95).

Respondent's deceptive statement that Detective Kelly's ballistics report was in court on petitioner's subpoena.

Respondent in its brief (pp. 38-39) tries to create the false impression that Detective Kelly's ballistics report was in court on petitioner's subpoena and readily available to defense counsel. The truth of the matter is that this report was in court only on a general subpoena. Defense counsel would not have known how to ask for it, for he did not know about it, and would not have known about it unless Detective Kelly took the stand. The prosecutor, of course, did not put Detective Kelly on the stand, as the Court may well know.

Respondent's deceptive statement that petitioner did not attack the jury's verdict in the New York Court of Appeals.

Respondent in its brief makes the deceptive statement that "while the jury's verdict was challenged by Point XV of petitioner's seventeen-point brief to the Appellate Division, there was no attack against it in the New York Court of Appeals" (p. 4). Of course not. It could not be attacked there as counsel for respondent knows as well as anybody else. In this case the New York Constitution limited the jurisdiction of the New York Court of Appeals to the review of questions of law. Article 6, section 3a of the New York Constitution, adopted by the People on

November 7, 1961, effective September 1, 1962, specifically provides:

> a. The jurisdiction of the court of appeals shall be limited to the review of questions of law except where the judgment is of death, or where the appellate division, on reversing or modifying a final or interlocutory judgment in an action or a final or interlocutory order in a special proceeding, finds new facts and a final judgment or a final order pursuant thereto is entered; but the right to appeal shall not depend upon the amount involved.

In an early case, *People* v. *Thompson,* 198 N.Y. 396, 91 N.E. 838 (1910), arising under an earlier but similar constitutional provision, the New York Court of Appeals held:

> The constitutional provision that no unanimous decision of the Appellate Division of the Supreme Court that there is evidence supporting or tending to sustain a finding of fact or a verdict shall be reviewed by the Court of Appeals (Constitution, article 6, section 9) is unqualified in its language and precludes a review thereof by the Court of Appeals in criminal as well as in civil cases. (*People* v. *Mingey,* 190 N.Y. 61; *People* v. *Maggiore,* 189 N.Y. 514; *People* v. *Huson,* 187 N.Y. 97; *People* v. *De Garmo,* 179 N.Y. 130.) * * * 198 N.Y. at 399, 91 N.E. at 839.

Under the circumstances of this case, defense counsel would have shown themselves ignorant of the law if they had attacked the jury's verdict in the New York Court of Appeals.

Conclusion

The respondent compounds the obsolete and unconstitutional way in which it obtained the instant judgment of conviction by the specious way in which it tries to hold on to it. The Court should grant review, and hold that the trial of this case does not measure up to the standards of the uniform system of criminal justice which the Court has given us.

Respectfully submitted,

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June, 1969